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Bankrupt Marketplace: First Amendment Theory and the 2016 Presidential Election

LEN NIEHOFF

In this article I advance two arguments. The first is that 2016 was a particularly important year for freedom of speech and of the press, although not for conventional reasons. The second is that the events of 2016 revealed that one of the essential components of our democracy—the central role that free expression plays in the democratic process—is in a state of serious dysfunction, if not crisis.

2016: An Important Year for the First Amendment

In determining the significance of a year for First Amendment purposes we often apply a measure that has to do with the decisions issued by the Supreme Court of the United States. We ask whether the Supreme Court gave us one or more cases that extended, limited, or clarified our understanding of this open and ambiguous text in a meaningful way.¹

So, for example, we might identify 1919 as such a year, because that is when Justice Holmes wrote his influential dissenting opinion in *Abrams v. United States*²—a case about which I will have a great deal more to say later. Or we might identify 1964 as such a year, because that is when the Supreme Court issued its opinion in *New York Times Co. v. Sullivan*³—a case that made it much harder for public officials to

bring libel cases based on critical statements made about them. Or we might identify 1971 as such a year, because that is when the Supreme Court decided *New York Times Co. v. United States*,⁴ a case that upheld the right of a newspaper to publish information even in the face of government allegations of national security concerns.

In this conventional sense, 2016 has no claim for special prominence. In the winter, the Supreme Court did not decide any especially provocative First Amendment cases. The closest it came was its decision in *Heffernen v. City of Paterson*,⁵ which somewhat expansively held that a public employee’s constitutional rights were violated when his employer punished him for engaging in protected speech—even though the employer was mistaken and the employee had *not*, in fact, made the statements in question. Furthermore, none of the half-dozen or so First Amendment-related cases on the Supreme Court’s fall docket seems likely to move the Court’s jurisprudence in dramatic ways.

No, 2016 is important for much less conventional and more colorful reasons. One reason relates to the invasion of privacy lawsuit brought against Gawker Media by Terry Bollea, a Florida resident who had professionally wrestled under the name “Hulk Hogan.” The case arose from the dissemination of a video made by Todd Clem—one of Bollea’s best friends—of

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FROM THE CHAIR

During the recent 23rd Annual Conference of our Forum on Communications Law, I had the pleasure of interviewing our keynote speaker, Jack Abernethy, CEO of Fox Television Stations, LLC, and co-president of FOX News. I asked him both before and during the interview to tell us what he expected from the attorneys who advise him, both in-house and outside counsel.

He gave an example of what he did not like. He took a flight many years ago and saw the programming of two broadcast networks available for viewing on the seatback monitors. Fox was not one of those networks. When he landed, he asked several in-house attorneys why Fox was not available on that airline. All of the attorneys said that it was unclear whether FOX had the necessary rights to allow the airline to offer Fox programming. The attorneys learned that the other two networks, like Fox, were also uncertain whether any third-party content providers would object to that exhibition of their content. The other networks ostensibly had taken a risk reasoning that, because the exhibition of third-party content would provide additional free exposure of the various programs, and the exhibition was on a closed system, the third parties would not object. Notwithstanding the analysis and decision of the other two networks, the Fox in-house attorneys remained steadfast with their advice that Fox could not and should not give the airline the right to exhibit its programming. They said outside counsel agreed with their assessment. He was clear that, rather than merely telling him what he could not do, the attorneys should have laid out the possible outcomes from taking the risk and the scope of potential damages in each scenario, to enable him to make the best decision.

I have no doubt that many of you



Carolyn Y. Forrest

reading this have been in the same situation. You have had to advise a client against taking the exact course of action that the client wants to take. I asked Mr. Abernethy to tell me whether the in-house attorneys could have said anything else that would have satisfied him. He said quite succinctly that

he expected his attorneys to know the law well enough to be able to assess the real-world risks of taking a particular course of action and to give him a realistic appraisal of such risks and the likelihood of any litigation. He immediately followed by saying that he would accept responsibility and would support his attorneys if adverse litigation resulted from a risk he took.

What Mr. Abernethy wanted from his attorneys seems obvious in hindsight. However, I am fairly certain that my initial judgment would have been to give the same advice as our other in-house attorneys. Conventional wisdom is that you cannot sublicense (or give-away) third party content without having clear rights to do so. You could be in breach of your license agreement and in violation of the owner's copyright. I have never discussed this situation with any of the attorneys who were involved, but I know they are all knowledgeable, accomplished lawyers who have the best interests of the company in mind. I also know that Mr. Abernethy ultimately decided to take the risk and none of the possible horrible outcomes came to pass. (The business executive, here the CEO, no less, can and must decide how much risk to take.)

Moreover, the keynote presentation really made me think a lot about what is expected of me, as an in-house attorney. As in-house attorneys, our role is not to make the decision for the businessperson by saying either "no" or "yes." Our role really is about helping the decision-makers achieve their goals, while also fulfilling our fiduciary duty

to the company, by ensuring that we have adequately advised the business people about the risks of their choices. I would go a step further and say that in-house counsel should also make the effort to present alternatives to the executive's suggested course, which might pose less of a risk to the corporation. (Note: You also would be wise to check the Model Rules of Professional Conduct regarding your obligations to the ultimate client, which usually is the corporation and not the executive decision maker. M.R.P.C. §1.13(b) provides "If a lawyer for an organization knows that an officer ... with the organization is engaged in action, intends to act or refuses to act, ... that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as

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determined by applicable law.”)

Because, as in-house counsel, we frequently must rely upon outside counsel to advise or represent our clients adequately, I also began to think more specifically about what we should expect from the outside counsel who we retain. I contacted in-house attorneys throughout Twenty-first Century Fox, FOX News Channel, FOX Group Legal and Fox Television Stations for their requirements. Everyone responded with more or the less the same points.

I should note at the outset that we all recognize that advising in-house attorneys is not easy. The Fox in-house lawyers are expected to be knowledgeable in their respective areas of expertise. (Long gone are the days when an in-house counsel’s job consisted primarily of hiring outside counsel.) We also are accountable to the business people. Thus, when we retain outside counsel we already have some idea of what the businessperson expects. And, because we have assessed the transaction or litigation matter before retaining outside counsel, we already have decided what we expect from your representation. Moreover, outside counsel, who are retained by in-house lawyers, must navigate the expectations of both the in-house lawyers and the business people with whom outside counsel may have limited or no contact. With these dynamics in mind, the following summarizes what Fox in-house lawyers want and expect from outside counsel.

Be the expert in your area. Know the substantive law. It no longer is sufficient for outside counsel merely to be knowledgeable, unless we already are aware of your limitations in a particular area. We are coming to you because we expect you to know more than we know in the substantive area. We also expect clear guidance about available choices. However, if you do not know the answer to a question, it is better to let us know right away that you need time to research it, than it is to waste time discussing an answer about which you are uncertain. (And, when the question is narrow in scope, you should not assign someone to research the issue, expecting us to pay for having a 15-page memo to the file drafted.) If it is an

issue where you do not feel comfortable outlining the answers, you should tell us so that we can decide whether a detailed memo would be helpful to us. You also should let us know when we can expect to receive your answer. Alternatively, you should consider whether it may be more appropriate for you to direct us to someone else in your firm who is more knowledgeable. However, the added cost of consulting with someone else in your firm should be an option for us to decide in advance.

Ensure that the junior members of your team are also knowledgeable. We do not want to pay for the time that an associate spends learning the relevant law. Supervise your associates closely enough to prevent them from spending hours pursuing red herrings. If it is litigation, know the most recent decisions in your jurisdiction and the local rules of your courts. For transactional work, know what provisions are standard or favored in the industry and, if your recommendation is to deviate from the standard, be ready and able to articulate why.

You also are expected to know something about the industry. Read the trades so that you are aware of the issues impacting us. You should even learn the applicable “terms of art” for the industry.

Be prepared before we retain you. For litigation, maintain files, ready at your fingertips, which spell out most possible scenarios for various types of cases. Have an outline for each phase of the litigation in state and federal courts handy. During the initial call, be able to outline clearly the alternative courses of action for the matter. For example, you should know, without having the issue researched, when the answer is due, how much time you have to respond to discovery that is filed with the answer, whether filing a particular motion stays discovery and whether there is an automatic right of appeal. You also should know the local rules of the applicable court.

For transactional matters, know what questions to ask. Have form language and alternatives for standard provisions of the agreement. Know whether you will need the assistance of

a technical advisor. Provide thoughtful analysis and suggest alternative strategies based on the concerns we give you. In other words, regardless of the type of matter, you should not have to reinvent the wheel each time we contact you.

Be able to provide practical advice. Although it may cost you a few billable hours, let us know when you think that another course of action might be to our advantage or might save us money. For example, if you are helping to draft an agreement, do we really need all of the bells and whistles. If you think we would be protected adequately with a shorter agreement, which might be easier to get the other side to accept, let us know that it could save time and money. If you think we would prevail in a litigation matter, but only after an appeal, let us know that settling might be a better outcome. We consider your ability to ground your legal advice in our business realities an “added value” – making us more likely to return to you.

Be respectful of our time. Because most of our in-house attorneys have multiple clients and multiple areas of responsibility, it is difficult to give our undivided attention to a single matter for extended periods of time, or to drop everything to give unscheduled attention to a matter you are handling. Therefore, it is helpful to discuss a deadline for submitting your draft and for you to honor it, even though it is an artificial one. We may need to circulate the draft to executives or other lawyers to whom we report. The agreed-upon deadline further should be sufficiently in advance of when it is required to give us time to review the draft.

Unless we have expressly asked you to send us a “rough” draft, we want to receive a “solid” draft; one that is not riddled with typos and grammatical errors. We prefer well-developed and supported arguments in a brief. In an agreement, ensure that a defined term is used consistently and that sections are accurately referenced throughout the document. Except in unusual circumstances, we do not want to receive sections of a document separately. We also do not want to rewrite, redraft or

redo your work product.

Before emailing or calling us to discuss a matter, think through what you want to say. It will help you to communicate your thoughts effectively. Consider whether it is possible for us to address a number of concerns in a single sitting, rather than addressing your concerns piecemeal. However, when there is an important development, communicate it without delay, particularly if it will require us to consider changing strategy, or it will increase the cost of your representation.

If you need us to make a decision, succinctly give us the pros, cons, and alternatives, keeping in mind possible outcomes and costs, and give us your recommendation.

Be cognizant of our budgeting and billing procedures. Fox has stringent controls in place requiring approval before any costs may be incurred. Regardless of whether a matter is litigation or transactional, we are required to submit and obtain approval for your budget. Likewise, our business people are responsible for maintaining their budgets and must be able to predict the cost of the legal services they will receive. Our process requires you to think through the work you will undertake and to use your best judgment about the staffing you will need. It is not acceptable for us to pay for multiple attorneys to learn the facts of the matter because you change staffing throughout the process. We also should not have to pay for junior members of the team to learn the substantive law.

While we understand that legal work is unpredictable, we expect you to keep track of your billing to ensure that you are remaining within the budget. If unexpected circumstances arise that may cause you to deviate from the budget, let us know what has changed and why it will require more time *before* you begin the work. You also should be able to give us a solid estimate of the additional fees so that we may again seek the required approvals. It puts us in a difficult position, and we may be unsuccessful, if we have to seek approval for an invoice that is over budget, after the time for the work already has been billed and the costs already have

been incurred.

It also is helpful if you do not delay in submitting your invoices. We do not like to chase outside counsel to submit invoices, but it is worse to receive invoices four months after the work was completed.

Lastly, be professional and courteous. We expect you to discuss in advance whether it is appropriate for you to make public statements about your representation of us for a specific matter. (In fact, we generally insist that outside counsel refrain from any public communications about our legal matters unless coordinated with us.) We think it is inappropriate for you to contact the businessperson without discussing it with us first. We appreciate the expertise of our outside counsel and enjoy the camaraderie when we are working together. My hope is that, by sharing our expectations and concerns, our relationships with one another will only be improved.

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Bollea having sex with Clem's estranged wife.

The brief and grainy video of their tryst found its way into the hands of Gawker Media, an online publication that delighted in revealing the secrets of the rich and famous. Gawker posted the video and Hogan brought an invasion of privacy action, which he won—big. A Florida jury awarded him \$115 million in compensatory damages (\$15 million more than he sought) and \$25 million in punitive damages.⁶

This case has very significant implications for the First Amendment in three respects. The first relates to the finding of liability in that case. For purposes of assessing the significance of that finding, I want to put aside questions about the specific conduct of Gawker, whether it should have posted the video, and whether it should have taken the video down when Bollea pro-

tested. Those are interesting questions, but I think the answers to them are unrelated to the broader significance of the case.

Rather, the finding of liability here is important because of Bollea's behavior *before* the video came to the public's attention. Prior to the posting of the video, Bollea had a long pattern of publicly disclosing abundant and detailed information about his sex life. These disclosures included revelations he made on the Howard Stern radio show.

This conduct posed a problem for him at trial, where he claimed privacy as to the same sorts of things he had openly disclosed to millions of people. Bollea dealt with this challenge by suggesting that the person who made those statements was his professional wrestler alter ego, Hulk Hogan, and *not* Terry Bollea himself, who had an intact right of privacy regardless of what his Hogan character had said and done.⁷

The finding of liability under these circumstances poses a significant problem for other media—including responsible mainstream journalists—as they move forward. After all, it is difficult, if not impossible, to discern the guiding and instructive principle that emerges from this result. Are we to understand that public figures that openly discuss private matters have a legitimate invasion of privacy claim if the *media* disclose the same information? Wouldn't such a rule create the risk of a privacy bait-and-switch, where a celebrity could lure the media into exploring a presumptively private topic and then sue them when they do?

Or are the lessons of the case limited to visual images? Numerous media entities had talked about Hulk Hogan's sexual escapades over the years but Bollea did not sue them. So is this case about the difference between words and video? And, if that is so, then is that intellectually coherent? How does a non-private matter become private by virtue of someone showing a video of it?

Or are the lessons here limited to videos about sex? Was Bollea able to capitalize on the lingering fragments of our Puritanical past—even at a time

when Americans support a multi-million-dollar pornography industry and spend vast amounts of time viewing online obscenity? One of La Rochefoucauld's famous maxims is that "hypocrisy is the tribute that vice pays to virtue."⁸ Did Hogan simply find a way to cash in as a big-time payee of our hypocritical guilt?

Or perhaps these are the wrong questions. Maybe the finding of liability here stands for the exquisitely narrow proposition that a media entity shouldn't post video of a popular professional wrestler having sex with his friend's wife. But if the case stands for something further—something that could and should shape the decision making of the mainstream media—then it is not obvious what that "something further" is. And in the field of free speech, where we view legal clarity as critical to the preservation of our liberties,⁹ a vague, amorphous, and free floating source of potential liability is deeply worrisome.

This case is even more troubling, however, because of the size of the verdict. The judgment against Gawker was so large as to drive the company into bankruptcy and effectively out of existence.¹⁰ This fulfilled a concern that the Supreme Court voiced in *New York Times v. Sullivan*—that civil judgments pose a fearsome threat to free expression.

Indeed, in *Sullivan* the Court argued that in this arena civil judgments pose even more troubling threats than criminal prosecutions.¹¹ After all, the Court observed, criminal fines tend to be relatively low; substantial procedural safeguards apply to criminal cases; and the principle of double jeopardy guards against multiple prosecutions for the same offense. In contrast, civil jury verdicts can be astronomical; procedural safeguards are fewer; procedural costs, such as those associated with discovery, can be crippling; and there is no double-jeopardy-like principle to protect a media entity from being sued by multiple plaintiffs over the same story. The Gawker verdict demonstrates how a civil lawsuit can accomplish something that no other kind of proceeding could have done: censor speech by annihilat-

ing the speaker.

And there is a third reason the Gawker case is particularly important. After the verdict came down, it became known that Bollea's lawsuit had been financially underwritten by Peter Thiel, the Silicon Valley billionaire who helped found Pay Pal.¹² In part, Thiel may have acted out of one of history's oldest motives—revenge—because Gawker had revealed that Thiel is gay, a fact he had maintained as private.¹³

Thiel has stressed that his support of Bollea was primarily about deterrence, sending a message on behalf of those who do not have the resources to pursue invasion of privacy claims against the media.¹⁴ To the extent Thiel offered this explanation as a source of consolation it provides none. An isolated act of retribution has less ominous implications than does a corrective philosophy that might find numerous occasions for expression.

Of course, the concern here should not be overstated. Third-party litigation funding serves a purpose within our civil justice system and has become increasingly commonplace.¹⁵ And, although such arrangements can give rise to ethical questions about whether the lawyer involved is maintaining his or her independence and is making decisions in the best interest of the client, it is not clear that the problems they create are any greater than those encountered when financing comes through insurance or a contingent fee.¹⁶ Finally, as a practical matter it seems unlikely that we will see a huge rash of billionaire-funded privacy and libel cases in the near future.

But it is also important that we do not understate the concern. At least to some degree, the design of our libel and privacy laws reflects our assumptions about the financial incentives that will exist for plaintiffs and defendants in such cases. Third-party litigation funding can skew those incentives and dramatically change the dynamics. Think, for example, of the financial motivations that would have existed for Terry Bollea to reach an early settlement with Gawker if he had been financing his own case and then what happens to those considerations when a billionaire

starts writing checks to cover his costs.

Furthermore, the Gawker case fulfills the most disturbing of possibilities anticipated by the Supreme Court in *Sullivan*. After all, the judgment in this civil suit did not just chill the speaker: it resulted in the onset of fatal hypothermia. Of course, it may turn out that third-party litigation financing will only rarely result in the bankruptcy and destruction of a media entity, but surely those numbers do not even need to reach double digits before we pronounce the consequences dire.

One additional fact makes Thiel's funding of the Hogan lawsuit particularly interesting. Thiel is closely linked with another public figure who has within the past year repeatedly threatened lawsuits against media entities and even individuals. That public figure is, of course, President Donald Trump, who named Thiel to the executive committee of his transition team.¹⁷

This brings us to the primary reason 2016 proved to be a particularly important year in the history of the First Amendment: the President. It seems inarguable that during the election cycle Mr. Trump had a profound and multi-dimensional influence on freedom of expression. This is not a partisan statement and for purposes of this article we need not decide whether that influence was beneficial or baleful or both. The measurement here refers simply to the extent of the influence and the multiple ways in which it played out.

During his campaign, Mr. Trump fully availed himself of his own right to freedom of expression. He used the full range of the vernacular. And he did so without any of the self-censorship or restraint that has usually characterized aspirants to our nation's highest office. Indeed, by one count, in the course of this election cycle Mr. Trump (via Twitter alone) insulted 282 different people, places, and things.¹⁸ Experts continue to try to discern the primary drivers of his election victory, but his apparently unfiltered speech may have held appeal for a number of voters.¹⁹

Mr. Trump so pushed the boundaries of ordinary political discourse that commentators repeatedly predicted that

he had, at long last, gone too far.²⁰ In this respect, however, a public appetite for unscripted speech may not be the only thing that helped Mr. Trump. He may also have received an assist from the fact that the public knew him as a television personality—as the outsized caricature of himself that he played as a guest on *Saturday Night Live* and as the star of *The Apprentice*.

In this sense, Mr. Trump deployed a strategy not unlike that used by Terry Bollea, although he did it less explicitly. He argued: do not confuse the “real me” with the “celebrity me,” the serious candidate who wants to shake things up in Washington with the guy who engages in “locker room talk.”²¹ And, as with Bollea, he benefited from the blurring of the very line he wished to draw.

The similarity is not surprising. Both Mr. Bollea and Mr. Trump owe a good deal of their notoriety to the Howard Stern show, where they honed their celebrity personas and put them on full display.²² Mr. Trump’s strategic use of his persona aligns with the trenchant observation made in *The Atlantic* that while the press took Mr. Trump literally but not seriously, his supporters took him seriously but not literally.²³

Furthermore, in advancing this speech, Mr. Trump made successful use of a wide variety of vehicles, ranging from local rallies to national television platforms to international social media. His use of Twitter was particularly noteworthy. He tweeted relentlessly—often into the late hours of the night and early morning—and (consistent with his unfiltered theme) never in the carefully curated voice of a handler or spokesperson.²⁴

While exploring the outer reaches of his own free speech rights, Mr. Trump argued vigorously for curtailing the expressive rights of others. For example, he declared that as President he would “open up” libel laws in order to make it easier for public officials to sue media entities.²⁵ “We’re going to have people sue you like you’ve never got sued before,” he declared.²⁶

To indulge in a variation on a phrase of Mr. Trump’s, this did not appear to be just “lawyer-room talk.” To the contrary, Mr. Trump has on numerous

occasions threatened libel suits against individuals and entities. For example, in October of 2016, his legal counsel sent a letter to *The New York Times* demanding a retraction of stories it had published about two women who had come forward to allege that Mr. Trump had forcibly touched them.²⁷ And in the same time frame he announced that after being elected he would commence libel suits against those women individually.²⁸

In a number of instances, Mr. Trump has gone beyond a demand for retraction and has commenced suit. Shortly before the election, Susan Seager prepared a report describing and assessing the speech-related lawsuits that Mr. Trump and his companies have filed. She reached the conclusion that Mr. Trump had proven himself to be a “libel bully,” because he used litigation to try to silence critics, but also a “libel loser,” because his efforts had met with little success.²⁹

Seager reports that, of the seven speech-related cases that Mr. Trump filed, four were dismissed on the merits and two were voluntarily withdrawn. And some of those cases—like a breach of contract lawsuit based on a prank pulled by Bill Maher—seem conspicuously weak. Nevertheless, as if to place a punctuation mark on the chilling effect that even unsuccessful libel suits can have, the American Bar Association initially expressed concern over publishing the piece in this journal.³⁰

At the same time, during 2016 a national dialogue ensued with respect to the legality of some of Mr. Trump’s own speech. For example, early on accusations were made that Mr. Trump had incited his supporters to engage in acts of violence against protestors at his rallies.³¹ Discussions about a presidential candidate unexpectedly turned to analyses of the Supreme Court’s decision in *Brandenburg v. Ohio*.³²

The debate intensified in August of 2016, when Mr. Trump gave a speech in which he decried Secretary Clinton’s likely appointments to the Supreme Court. He cautioned: “If she gets to pick her judges, nothing you can do, folks.” And then added: “Although the Second Amendment people—maybe

there is, I don’t know.” This comment sparked a discussion of whether Mr. Trump had made a distasteful joke or had crossed a line by encouraging his followers to assassinate Clinton or her judicial nominees.³³

Then, toward the end of his campaign, concerns were expressed that he was inciting crowds to violence against the media—a favorite target of his criticisms.³⁴ Allegations were made that journalists had been verbally harassed, violently grabbed, choked, and thrown to the ground.³⁵ A photograph went viral of a man wearing a t-shirt at a Trump rally that had emblazoned across the back the words: “Rope. Tree. Journalist. Some assembly required.”³⁶

Turning the tables, a debate also ensued over whether the women who had accused Mr. Trump of assaulting them could sue *him* for libel on the theory that he had falsely accused them of lying.³⁷ Such lawsuits have a recent precedent. When Bill Cosby claimed that the women who had accused him of sexual assault had lied, a number of them sued for defamation.³⁸

Discussion of Mr. Trump’s statements involved not just domestic but international law. Toward the beginning of his campaign, questions were raised to as to whether some of his statements about Arab-Americans, Muslims, and Mexicans ran afoul of European “hate speech” laws.³⁹ Some public officials even argued that he should be banned from entering their country on this basis.

2016 thus proved a signal year in the debate over the reach and limitations of freedom of expression. But additionally—and ironically—2016 is of critical importance for another reason as well. For it was during this period that we also saw a massive failure of our leading conceptual model of how free speech works and how it contributes to the democratic process.

Our Democratic Crisis

This brings me to my second argument: that we are in the midst of a crisis involving an essential component of our democracy. I refer here to a dynamic that goes to the very heart of how our democracy works—or does

not work. And that dynamic is directly connected to the First Amendment and the role that it plays in the preservation and advancement of our republic.

We can begin with a straightforward and non-controversial proposition: the free speech protected by the First Amendment plays an essential—indeed, indispensable—role in the democratic process. The Supreme Court has repeatedly so held, often deploying some of the most rhapsodic language it knows how to use. This includes Justice Brandeis’s poetic concurring opinion in *Whitney v. California*.⁴⁰

In that opinion, Brandeis declared that “[t]hose who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.” He added that they believed that “without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.” The Supreme Court has sounded the same theme in numerous later decisions, in opinions written by justices across the political spectrum.

Over time a dominant conceptual model has emerged to describe how free expression plays this central role in our democracy. I do not mean to suggest that there is only one such model—to the contrary, courts and legal scholars have articulated a variety of explanations for why free expression matters and how it helps us achieve our democratic goals. But the most persistent and influential model for how the First Amendment works in our democratic system almost certainly comes from the opinion of Justice Holmes in *Abrams v. United States*.⁴¹

As Lee Bollinger has stated, “[W]ithin the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech.”⁴² In the same vein, Ronald K.L. Collins has observed that

“in its own secular way, the opinion has become canonical.”⁴³ Some notable scholars have criticized the opinion, but “many view [its central] metaphor as key to any healthy system of freedom of expression.”⁴⁴

The facts of *Abrams* seem stunning today. Five people wrote, printed, and distributed leaflets around New York City that were supportive of the Russian Revolution and that, by contemporary standards, seem utterly harmless. Although this was the extent of their activity, the five were charged with and convicted of violating the federal Espionage Act. In one of its darker and less competent moments, the Supreme Court upheld the convictions.

Justice Holmes wrote a dissenting opinion that has so carried the judgment of history that people sometimes forget it was a dissent. Justice Holmes begins by noting the understandable, perhaps even good, intentions of those who want to censor speech:

Persecution for the expression of opinions seems to me perfectly logical. If have you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.

Holmes starts with this valuable insight: the impulse to silence speech with which we disagree is understandable and extends to people with benevolent designs.

Of course, this does not make the impulse any less dangerous. In his dissenting opinion in *Olmstead v. United States*,⁴⁵ a case involving a different kind of constitutional concern, Justice Brandeis observed that: “Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”

And so Holmes continues:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

This model—often called the “marketplace of ideas” model—tells us how free speech works to advance our democratic goals: ideas compete for our allegiance in a free market; through this competition we entertain alternative possibilities; as a result of this consideration and analysis we arrive at the truth; and that truth empowers us to participate constructively as informed citizens of our democracy.

This model rests upon certain assumptions about this market operates, how human beings behave, how we receive and consider information, how we ascertain the truth, and how we make decisions based on what we have learned. In 2016, however, most—perhaps all—of these assumptions turned out to be wrong. To stay with Justice Holmes’s storied metaphor, in this election cycle the marketplace of ideas went just as bankrupt as Gawker Media.⁴⁶ We can see this if we consider some of the assumptions that underlie Justice Holmes’s model and see how they betrayed us this year.

As an initial matter, the marketplace of ideas model assumes that people will receive information (or what passes for it) in quantities that they can manage. But this election cycle has shown us that this assumption no longer holds true. Although the model rests upon the proposition that more information is always better, 2016 showed us that at some point the number of inputs becomes so great, and their pace so fast, that we can no longer effectively process them.

Writing before we understood the full significance of this informational barrage, Justice Scalia said *McConnell v. FEC*,⁴⁷ concurring in part and dissenting in part:

The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a [great] problem to overcome ... Given the premises of democracy, there is no such thing as too much speech.

Or so we thought.

The too-many-inputs-too-fast phenomenon might not be problematic if we responded by slowing down, working through the complexity, and withholding judgment until we had sorted things out. But for the most part we do not do that. Because the informational onslaught moves quickly and does not let up we find it difficult to focus our attention on the same issue for a sustained period. We therefore often take a much simpler course, simply defaulting to our biases and predispositions.

Sociologists and psychologists have documented that when we find ourselves in a “landscape of near-infinite choice,” we “do what feels easiest”: we gorge on information that aligns with what we think and ignore what does not.⁴⁸ Or, as Simon and Garfunkel succinctly put it: “a man hears what he wants to hear and disregards the rest.” In this sense, we no longer have a marketplace of ideas; we have a marketplace of confirmation bias. And this undermines one of the principal goals of the marketplace of ideas, which is to compel us to defend our accepted truths—or abandon them.

The marketplace of ideas model further assumes that we will be able to sort reliable information from unreliable. But 2016 showed us that this assumption no longer holds true, either. In the course of this election cycle it became apparent that “fake news” stories were

being uncritically accepted, posted, reposted, and re-posted on social media.⁴⁹ To take one dramatic example, a widely circulated fake news report identified a pizza parlor as a front for a child abuse ring secretly run by Hillary Clinton and John Podesta—a story absurd on its face but that some people accepted so literally as to prompt them to threaten the restaurant owner.⁵⁰ Measuring the effect, if any, that fake news had on the election and its outcome poses serious challenges, but there are good reasons to believe that these stories may have significantly skewed public dialogue and opinion during the past year.

The public’s inability to tell reliable from unreliable information may have given both major party candidates increased confidence that they could freely indulge in misstatements. This may explain the dismal truthfulness records both candidates amassed. Perhaps such behavior inevitably comes with the territory of a marketplace of ideas where the making of false statements has no negative consequences.

Consider Politifact’s evaluations of Mr. Trump and Secretary Clinton. The Politifact website assessed 19% of Mr. Trump’s evaluated statements as mostly false, 34% as false, and 17% as what they call “pants on fire” false. Hillary Clinton scored better, with 14% as mostly false, 10% as false, and only 7% in the worst category. In other words, Politifact maintains that the *more truthful* of our two major candidates was making false statements to us almost a third of the time.

In the course of 2016, we also discovered just how stubborn misinformation can be. Efforts made to correct false statements were often dismissed as the work of partisans or mouthpieces or a biased and unreliable press—the last an ironic criticism given the prevalence of fake news in non-mainstream media. But the important point is this: the marketplace of ideas becomes wholly unworkable once no form of counter-argument remains possible; at this stage, the marketplace of ideas becomes the marketplace of ossified stances.

Occasionally in 2016 the struggle with misinformation became so great

that the media were excoriated for not reporting facts that were not facts. For example, during this election cycle Mr. Trump bemoaned that the murder rate is the highest it has been in forty-five years and chided the press for not reporting on it. But the omission is easily explained: this “fact” is simply wrong. Indeed, the murder rate is less than half of what it was in 1980 and it is lower than it has been during any time between 1965 and 2009.⁵¹

These developments have prompted some commentators to ask whether we have entered into a “post-factual” or “post-truth” politics.⁵² The irony is titanic. In the midst of vast, prevalent, and easily accessible information, facts and truth appear to have become an unanticipated casualty. And even if we do not accept quite so dim an assessment, it seems clear that truth struggles now, more than ever, to get breathing space—let alone attention and allegiance.

In this respect, it is important to note that the marketplace of ideas model also assumes that we *care* about the truth and *want* to find it. But 2016 strongly suggests to us that an election may have little to do with what is factually right or wrong. An election may be about something else altogether: a shaking up; a destabilization; a cry for something different; an angry scream from those who believe no one hears them anymore.

Such gestures are not wholly without value in our quest for truth. If someone yells: “You’re not listening to me!” they may be right and the complaint may be justified. But, importantly for purposes of how we ordinarily think about the marketplace of ideas as functioning, the yelling does nothing to advance the merits of any underlying substantive point.

There are other problems as well. The marketplace of ideas model assumes that all ideas will have equal access to the conversation. But in 2016 the barriers to entry into this market became obvious. For example, critics pointed out that three presidential debates were conducted with almost no discussion of climate change, which many people view as one of the most

pressing issues of our time.⁵³

Or consider this: at present, an estimated 1.4 million American children are homeless.⁵⁴ We heard almost nothing about this during the 2016 election cycle—and certainly less than we heard about Mr. Trump’s sexual peccadillos and the size of his hands and Secretary Clinton’s emails and her stumble on some stairs. It seems reasonable to expect that ideas about how to address this national tragedy should enter the marketplace where we supposedly engage in our national problem solving. The absence of such discussion may prompt us to wonder whether in 2016 the marketplace of ideas wholly crashed and we now find ourselves in a Great Depression of clear, informed, and productive thought.

Conclusion

There is no single, comprehensive strategy for restoring the vigor, integrity, and viability of this market. Some measures are already underway, such as efforts by Google and Facebook to police the dissemination of fake news. But our fundamental, and most daunting, challenge lies in the reality that the effective functioning of the marketplace of ideas depends upon our cautious, critical, and considered analysis of the “information” that comes our way. That has always asked a lot of human beings; in the current communications environment it demands still more.

It may console us, in some small way, to remember that the man who formulated the marketplace of ideas model was a pragmatist and realist. Justice Holmes understood that this marketplace could sputter, fail, and leave us intellectually and ideologically bereft. But he saw it as the best, if not the only, means through which we might accomplish the ideals of democracy.

“It is an experiment,” he says in his dissent in *Abrams*, “as all life is an experiment.” And so it is. Sometimes the experiment will go well. Sometimes it will go poorly. Sometimes its protocols will work effectively. Sometimes they will need fine-tuning or even radical adjustment.

Sometimes the experiment will lead us to grand discoveries. Sometimes it

will reveal to us, in the language of a sacred text, “things hidden since the foundations of the world.” Sometimes the experiment will fail spectacularly. Sometimes the laboratory will catch on fire.

Endnotes

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Defending the Physician's Defamation Claim

GAYLE C. SPROUL AND MATTHEW L. SCHAFER

“Dangerous Doctors,” “Doctors are bad for your health,” and “Surviving Your Doctors” are catchy titles of no doubt interesting news reports, but these reports can attract more than curious consumers. There is an obvious risk inherent in any news report that calls into question a physician's medical judgment. Such reports can sometimes result in either exorbitant jury verdicts¹ or dearly won verdicts for the defense. In light of this, it is worthwhile to consider routes to early dismissals. There are two in particular that may work, depending, as always, on the facts.

First, defamation lawsuits casting doubt on a doctor's medical judgment can often be defended on opinion grounds asserted in a motion to dismiss. It is not at all unusual for physicians to disagree with each other regarding treatment. A doctor who is a defamation plaintiff may readily admit that treatments can differ because of differing professional opinions, and defamation defendants can capitalize on such disagreements in fending off these lawsuits.

Second, doctors who have gained special prominence in their fields or those who advertise extensively may be deemed limited purpose public figures. If that is a possibility, defendants should consider moving to bifurcate discovery to focus first and exclusively on evidence of the plaintiff's status and the lack of actual malice, followed by an early summary judgment motion relying on the absence of evidence of actual malice. This can avoid otherwise inevitably costly and complex substantial truth discovery that can resemble that of a malpractice lawsuit, with all of the often thorny medical determinations that may entail.

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Medical Reporting and Analysis: It's a Matter of Opinion

In general, medical reporting is, at its heart, a review of opinions based on objective medical data. When a reporter learns that a doctor has been accused of performing unnecessary surgeries or committing large scale malpractice, for example, the reporter then does what reporters routinely do: conducts interviews with those patients willing to speak, with hospital officials, and possibly with other physician-experts, attempts to interview the physician at the center of the controversy, and collects documentation. Assuming that the underlying facts are reported correctly, the upshot of this reporting is essentially a presentation of varying opinions, at least some of which will be decidedly negative.

Medical standards of practice should generally be viewed, fundamentally, as guidelines for treatment and represent the opinions of leaders in the field. As the former director of the National Institutes of Health explained, “We don't hear much about the art of medicine these days, but doctors know what it means [T]he best doctors respect but are not hidebound by statistical means that may fall short of responding to ‘What's right for me?’”²

The opinion defense is also supported by the proposition that “legitimate ongoing scientific disagreement” is not subject to being proven true or false and is better left to the realm of science and medicine than litigation.³ To the greatest extent possible, defendants should focus on this aspect of medical reporting in defending cases brought by physicians.

Asserting the Opinion Defense

Although the plaintiff will undoubtedly and necessarily allege that the subject report contains a collection of false and defamatory factual statements, the news report may be used to demonstrate that the allegedly defama-

tory statements are instead the opinions of the patient and the medical professionals whose views are included in the report.⁴

It is for the court to decide in the first instance if a statement is an opinion rather than an assertion of fact.⁵ News reports about medical malpractice often will disclose the facts underlying the accusations against a doctor and then include interviews with the patient or experts who express opinions regarding the patient's treatment. So long as the facts on which those opinions are based are stated in the report (and are true or privileged), the opinions should not provide a basis for liability.⁶

Thus, for example, in *Images Hair Solutions Medical Center v. Fox News Network, LLC*, the court found that the allegedly defamatory statements were expressions of opinion and, therefore, not actionable.⁷ The plaintiffs operated a hair-loss restoration business using a laser treatment called MEP-90. The five-minute news report included an interview with a doctor unaffiliated with the hair-loss clinic, who stated his view that the MEP-90 was ineffective.⁸ The doctor's statements, the court explained, were medical opinions based on uncontested facts and thus were not actionable and the complaint was dismissed.⁹

On the other hand, in *Dougherty v. Boyertown Times*, this approach was only partially successful because of the court's view that undisclosed facts were implied by the published opinions.¹⁰ There, a chiropractor sued a newspaper over statements made about him by the wife of a patient in a letter to the editor. The patient's wife complained about the plaintiff's billing methods and characterized the treatment of her husband as “ineffective and possibly harmful,” stating that her husband “became worse and had to go to another doctor.”¹¹

Although the court dismissed as opinions the wife's statements regarding billing, it declined to dismiss the claims

regarding treatment because no facts about “[t]he nature and frequency of the treatments as well as [the patient’s] condition before, during and after these treatments [were] addressed.”¹² Moreover, because “the author of the letter was the patient’s wife, a reader of the letter could easily infer that the wife . . . was in a good position to know undisclosed facts concerning the treatments upon which she based her opinion.”¹³ For these reasons, the court held that the statements were “mixed opinion which could reasonably be interpreted to imply undisclosed defamatory facts,” and therefore refused to dismiss the remaining claims.¹⁴

Doctor v. Doctor

Images Hair Solutions and *Dougherty* are two of the very few decisions on this issue involving the media. Most of the precedent comes instead from cases in which doctors are sued for offering their expert opinions regarding treatment by another doctor. An opinion is an opinion, so these cases are nevertheless helpful in briefing a media defamation case.

For example, in *Woodward v. Weiss*, a doctor-plaintiff sued for defamation another doctor who prepared an expert report questioning the plaintiff’s treatment of patients after a car accident.¹⁵ The defendant had stated in the report: (1) “[the patients] have both received excessive and not recommended treatment and x-rays”; (2) “[the doctor’s] opinion that these patients were entitled to 5% and 6% permanent disability . . . is not supported by the records”; and (3) “[t]he treatment rendered is far in excess of any possible injury from this accident.”¹⁶

The *Woodward* court concluded that these statements “are all opinions, not verifiable facts,” because there “is no standard which could be used to render an objective, verifiable, factual answer to these questions.”¹⁷ Indeed, it held: “Medicine, with all its great accomplishments, remains an inexact science. Doctors frequently refer to ‘medical science’ but other disciplines have always referred to the practice of medicine as the healing art. Treatment considered appropriate by one doctor

may be considered excessive by another doctor.”¹⁸

Similarly, in *Marshall v. Planz*, a doctor-plaintiff alleged that the defendant “made an unfounded quality of care complaint” to a hospital committee, “criticizing and questioning [the plaintiff’s] treatment of two patients.”¹⁹ The defendant’s specific concerns related to “an incident with an extubation of a patient in the [cardiovascular surgery intensive care unit] . . . that he thought didn’t display good judgment” and “that two of [the plaintiff’s] patients had suffered post-operative strokes,” arguably implying that the plaintiff had “poor medical judgment.”²⁰

The court found this alleged implication to be a non-actionable expression of opinion. It noted that the implication “like virtually all judgments regarding the adequacy of a physician’s treatment of his or her patients, may be debatable among medical experts.”²¹ It concluded that the implication had an “inherently subjective nature, confirming that [the] opinion is not capable of being verified as true or false, and that it presents or implies no truly objectively verifiable facts that would infuse it with defamatory content.”²²

Likewise, in *Willman v. Dooner*, the court held that statements that the plaintiff could have used an alternative method to better treat the patient and performed multiple unnecessary surgeries were opinions.²³ And, in *Morris v. Blanchette*, the court concluded that stating “it would not really be appropriate to continue” treatment and that there was “no medical necessity for any additional treatment” were expressions of opinion.²⁴

Malpractice and Other Lawsuits

Doctors attempting to stave off adverse medical malpractice judgments often rely on a similar opinion defense. In *Mohan v. Westchester County Medical Center*, for example, the plaintiff brought suit for malpractice after a doctor released a patient with delusions who later killed his brother, who was the plaintiff’s husband.²⁵ In concluding that the plaintiff’s expert testimony that the hospital “failed to consider” the strength of the delusions

was not persuasive, the court held that “the decision to release [the patient] was” nothing more “than a professional medical determination.”^{26, 27}

The Public Figure Physician

In addition to the protection afforded by the opinion defense, physicians may, in many instances, be elevated to the rank of public figure, thus requiring them to demonstrate actual malice in order to prevail on defamation and related claims. Discovery into that status and into the existence of actual malice – accompanied by the possibility of an early summary judgment motion – may limit the overall discovery in these cases by precluding an extensive inquiry into the truth or falsity of statements regarding the patient’s treatment, which, as noted, can take on the quality, and expense, of a malpractice case.

It is most likely that a physician will qualify as a limited purpose public figure rather than a general purpose or involuntary public figure.²⁸ In analyzing whether a plaintiff is a limited purpose public figure, the standard is well-known: a court must generally consider whether (1) the alleged defamation involves a public controversy; (2) the plaintiff played an important role in the controversy; and (3) statements were “germane to the plaintiff’s involvement in the controversy.”²⁹

Grounds for Public Figure Status

The “paradigm of the limited-purpose public figure” is Dr. William McBride, an Australian doctor and expert on birth defects.³⁰ *Science* published a story about McBride in the context of the battle over the once commonly prescribed drug Bendectin, taken by millions of women experiencing morning sickness in pregnancy. In subsequent class action litigation, the plaintiffs claimed that the drug was the cause of severe birth defects. McBride, a vocal and published proponent for the anti-Bendectin camp, argued that he was not a public figure and thus should not have to prove actual malice, but the D.C. Circuit disagreed:

The alleged link between Bendectin and birth defects had begotten a widespread and heated public contro-

versy over the drug's safety. McBride voluntarily entered this controversy, intending to influence its outcome. As a world-renowned expert on birth defects – he was prominent in discovering the dangers of Thalidomide and has been dubbed the “Father of Teratology” [the study of physiological defects] – McBride occupied a central place in the Bendectin debate. His role included testifying before the FDA about the perceived dangers of Bendectin and serving as an expert witness in litigation challenging the drug's safety.³¹

In other words, the doctor “vigorously [took] an important role in a current public controversy,” thereby assuming “public figure status.”³²

In addition, the nature of a doctor's work and resulting stature in the community can make public figure treatment especially appropriate.³³ As the Third Circuit explained in *Marcone v. Penthouse International Magazine for Men*, “[w]here a person has . . . chosen to engage in a profession which draws him regularly into regional and national view . . . he invites general public discussion.”³⁴ In other words, “If society chooses to direct massive public attention to a particular sphere of activity, those who enter that sphere inviting such attention must overcome the *Times* [actual malice] standard.”³⁵

In *Marcone*, the court followed the lead of the Fifth Circuit in *Rosanova v. Playboy Enterprises, Inc.*,³⁶ where the plaintiff was held to be a limited purpose public figure based on his “underworld ties” regardless of his “desires” to remain a private figure:

[T]he status of public figure *vel non* does not depend upon the desires of an individual. The purpose served by limited protection to the publisher of comment upon a public figure would often be frustrated if the subject of the publication could choose whether or not he would be a public figure. Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow. It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose

to be. It is sufficient, as the district court found, that “Mr. Rosanova voluntarily engaged in a course that was bound to invite attention and comment.”³⁷

Decisions Regarding Public Figure Status

Medicine is rife with unsettled questions and controversies, and prominent physicians who take sides or can be fairly characterized as leaders in fields where controversy exists may fairly be deemed public figures.

Thus, courts have found physicians to be limited purpose public figures where they are considered to be “pioneers” of controversial treatments or procedures or “fathers” of particular branches of medicine. In *Patrick v. Cleveland Scene Publishing, LLC*, for example, a doctor who associated himself with the inventor of the Heimlich Maneuver was found to be a public figure because there existed a “public controversy” relating to “the development, acceptance, . . . and specific application of the Heimlich Maneuver.”³⁸ And in *Park v. Capital Cities Communications, Inc.*, the court held that a doctor who was a “‘pioneer’ or ‘champion’ of new techniques in eye surgery” and invited public attention through local radio and television appearances was a public figure for the purposes of comment on the state health department's inquiry into his practice.³⁹

Potential public figure physicians may also publish books or articles in medical journals, or lecture their colleagues on controversial or new modes of treatment at conferences. In *Renner v. Donsbach*, the court found a “well-respected [medical] scholar, author, lecturer, professor of family medicine and consultant in the areas of family practice and health and nutrition fraud” to be a public figure with respect to those topics.⁴⁰ And in *Schwartz v. American College of Emergency Physicians*, the Tenth Circuit found public figure treatment appropriate where a doctor-plaintiff had published his medical views about emergency medicine in an editorial and was generally “held in high repute” as a doctor.⁴¹ As the Seventh Circuit has explained, “By publishing your views,” in that case in

scientific journals, “you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition of the marketplace.”⁴²

Courts have also found doctors to be limited purpose public figures where they are battling an investigation into the quality of their patient care. As an example, in *Rodriguez-Erdmann v. Ravenswood Hospital Medical Center*, the court found that a doctor was a public figure after holding a press conference to oppose an adverse disciplinary report alleging “major compromises in patient care.”⁴³ Similarly, in *Govito v. West Jersey Health System, Inc.*, a New Jersey appellate court found a nurse under investigation for dispensing narcotics without a medical license was a public figure due to the “undoubtedly” public interest of the “quality of health care at hospitals” and because she was “an integral partner in the health care delivery network.”⁴⁴

And some courts have gone even further, finding that a doctor's success in creating a nationwide practice sought out by patients far and wide may transform him or her into a limited purpose public figure. In *Martinez v. Soignier*, for example, the doctor was properly considered a public figure for purposes of comments regarding his surgeries on “women from throughout the United States [who] came to Opelousas for Dr. Martinez to perform breast augmentation surgery.”⁴⁵

Not all courts take this approach, however. In *Bongiovi v. Sullivan*, the plaintiff and the defendant were both plastic surgeons, and the evidence showed that the defendant had lied to a patient in telling her that the plaintiff had “killed” one of his patients on the operating table.⁴⁶ The Nevada Supreme Court affirmed the trial court's refusal to characterize the plaintiff as a public figure, even though the plaintiff had:

[A] national reputation as a skilled and caring plastic surgeon, went to the top-rated medical school in the country, was trained at the top-rated plastic surgery school in the country, part of his training was at the leading cosmetic surgery hospital in the

country, where he later became chief and ran the residency program, was selected for a prestigious fellowship, was Chief of Plastic Reconstructive Surgery of Wayne State University's Children's Hospital of Michigan, had published numerous articles and abstracts, contributed to chapters in books and textbooks, and belonged to specialized medical groups. He traveled to Nepal and Africa on his own expense to provide medical care. He was the subject of newspaper articles because of a surgery performed on an infant. Other doctors testified that Sullivan had a national reputation and was prominent in the plastic surgery field.⁴⁷

This case may be an outlier and its outcome may be explained by the old axiom that bad facts make bad law, but it is a lesson in practicality that litigators must nevertheless heed.⁴⁸

Case in Point

A recent case demonstrates how both of these issues may arise. It grew out of a news report regarding a hospital's investigation into possibly unnecessary surgeries performed by the plaintiff on over 700 patients, each of whom was notified by the hospital of this possibility. Plaintiff claimed that the news report implied that he was a bad doctor. In his complaint, however, and throughout the litigation, he touted himself as a renowned surgeon, prominent in the United States and Asia, who had mastered a novel surgical technique and then submitted articles and abstracts about it to medical journals, which were eventually published. He also lectured about and taught the technique to other surgeons in the United States and Asia. In addition, the plaintiff was a long-time professor at a well-regarded local medical school who led community health programs, encouraging lay individuals to consult with him on the surgery at issue. At the same time, the efficacy of the surgeries was also part of an ongoing debate in the profession, with some specialists taking the view that they were useful and necessary in treating disease, while others equally qualified, publicly disagreed. And, in addition to the ongoing

hospital investigation discussed in the news report, the doctor was, at the time of the broadcast, the subject of insurance investigations regarding the necessity for his many surgeries.

The court allowed bifurcated discovery, permitting the parties to focus on the plaintiff's status and any evidence of actual malice, avoiding, at least at the outset, time-consuming and complicated discovery on the plaintiff's treatment of hundreds of patients. In discovery, he submitted to the defendants an impressive 59-page CV detailing his many accomplishments and accolades. At the same time, he submitted letters from supportive colleagues, who referred to him as, among other things, "a living legend" and the doctor to whom other doctors would go when they needed treatment. All of this was intended to buttress his claim that he had previously had a flawless reputation, but this material also served the purpose of demonstrating the lofty, public figure-like perch occupied by the doctor in his field of practice. The defense also did its own independent research into the doctor's career history, collecting, among other things, numerous publicly available scientific and lay publications that described the ongoing controversy in general and the plaintiff's own prolific scientific publications.

Relying on the case law discussed above, a credible case was made that the plaintiff was a limited purpose public figure on the topics contained in the subject news report, thus requiring proof of actual malice, which did not exist. In addition, at his deposition, the doctor helpfully testified that it was his "opinion" that the surgeries were required and further that no one could prove that he was wrong because medical practice depends on the doctor's own interpretation of the patient's symptoms, and that critics were simply voicing contrary "opinions."

The lawsuit was ultimately withdrawn after the filing of the defendant's motion for summary judgment.⁴⁹ Thus, the case was concluded without any inquiry into the necessity of any of the 700 surgeries at issue in the matter.

Conclusion

As with any case, the facts will dictate whether these defenses should be pursued and whether they will be effective. But, at a minimum, these defenses warrant serious consideration, particularly in light of the potential for exposure and the burdensome nature and expense of discovery in these complex cases.

Endnotes

1. See, e.g., *Daniel Dugi, M.D. v. KPRC-TV, et al.*, 4 Tex. J.V.R.A. 12:C1 (Tex. Dist. Ct. May 6, 2013) (lawsuit stemming from investigative report into administration of allegedly non-FDA approved antiseptic; award for \$6,000,000 to be paid by defendant source; television station settled prior to bench trial); see also *Tampa Bay Doctor Wins \$10 Million Libel Suit Against Florida Newspaper*, Insurance J. (Sept. 3, 2009), <http://www.insurancejournal.com/news/south-east/2009/09/03/103517.htm> (verdict of \$10 million later overturned by trial court judge and affirmed by the intermediate appellate court, see Stewart Bishop, *Fla. Appeals Court Nixes Ex-Hospital Chief's \$10M Libel Win*, Law 360 (Oct. 20, 2011), <http://www.law360.com/articles/279512/fla-appeals-court-nixes-ex-hospital-chief-s-10m-libel-win>); Matt Lait, *Doctor Wins \$16 Million in Libel Suit Against Paper: Defamation: Jurors find a Vietnamese-language journal in Westminster guilty of soiling the physician's reputation. It's the biggest-ever California award*, L.A. Times (Sept. 14, 1991), http://articles.latimes.com/1991-09-14/local/me-2078_1_libel-suit (the award was later reduced to \$5 million; subsequent additional history is unknown, see Thuan Le, *Publisher Vows Fight Against \$5-Million Libel Award*, L.A. Times (Oct. 23, 1991), http://articles.latimes.com/1991-10-23/local/me-316_1_libel-award); *Anderson v. Hubbard Broad.*, 2011 WL 6175690 (Minn. Dist. Ct. Nov. 7, 2011) (awarding \$1,000,000 to a non-physician naturopath after broadcast stating that naturopath's advice nearly resulted in death of patient (post-trial details unpublished)).

2. Bernadine Healy, *Medicine, The Art*, US News & World Report (July 13, 2007), <http://www.cbsnews.com/>

news/medicine-the-art.

3. See, e.g., *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497-98 (2d Cir. 2013) (“Scientific controversies must be settled by the methods of science rather than by the methods of litigation.” (citation omitted)); *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) (“More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us.”); *Auvil v. CBS 60 Minutes*, 836 F. Supp. 740, 743 (E.D. Wash. 1993) (reporters should not be forced to “perform a highly technical scientific study [as to the accuracy of the claims] before issuing a public broadcast”).

4. “[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection,” so long as such a statement does not “reasonably impl[y] false and defamatory facts.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

5. See, e.g., *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 1 F. App’x 653, 654 (9th Cir. 2001) (“conclud[ing] as a matter of law that the various statements that [the doctor] alleges are defamatory are merely opinions”).

6. See, e.g., *Adelson v. Harris*, 973 F. Supp. 2d 467, 490 (S.D.N.Y. 2013); *Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995); *Moldea v. New York Times Co.*, 22 F.3d 310, 317 (D.C. Cir.1994); *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 32 (D.D.C. 1995) (citing *Milkovich*, 497 U.S. at 13), *aff’d*, 88 F.3d 1278 (D.C. Cir. 1996); Restatement (Second) of Torts § 566, cmt. c.

7. 2013 WL 6917138, at *1 (Del. Super. Dec. 20, 2013). Where the facts underlying the opinions are contested or are not privileged, the opinion defense can be preserved in the answer and raised on summary judgment. In taking the doctor-plaintiff’s deposition, an effort can be made to examine the plaintiff regarding his or her opinion concerning the treatment at issue, which should be helpful in framing the opinion issue for summary judgment.

8. *Id.*, at *4.

9. *Id.* (“As it was a medical opinion, the First Amendment’s protections can only be overcome if the doctor relied on false facts.”).

10. 547 A.2d 778, 780 (Pa. Super. 1988).

11. *Id.* at 785.

12. *Id.* at 786.

13. *Id.*

14. *Id.*; see also *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 946 (11th Cir. 2017) (noting that plaintiffs could not demonstrate actual malice because they “are unable to show that many of [defendant’s] statements [regarding plaintiffs’ novel use of medicine] are . . . anything more than medical or personal opinion”).

15. 932 F. Supp. 723 (D.S.C. 1996).

16. *Id.* at 726.

17. *Id.*

18. *Id.*

19. 13 F. Supp. 2d 1246, 1250 (M.D. Ala. 1998).

20. *Id.* at 1257.

21. *Id.* at 1258.

22. *Id.*

23. 770 S.W.2d 275 (Mo. Ct. App. 1989).

24. 181 S.W.3d 422 (Tex. App. 2005); see also *Kahn v. Burman*, 673 F. Supp. 210, 216 (E.D. Mich. 1987) (granting motion to dismiss a doctor’s defamation suit based on expert report because the report contained the defendant’s “subjective evaluations of objective medical data”), *aff’d*, 878 F.2d 1436 (6th Cir. 1989).

25. 145 A.D.2d 474, 474 (2d Dep’t 1988).

26. *Id.* at 475; see also 61 Am. Jur. 2d Physicians, Surgeons, Etc. § 332 (2d ed. 2016) (“Evidence showing a difference of opinion among experts may not provide an adequate basis for a prima facie case of medical malpractice.”).

27. Another species of defamation lawsuit is now being brought by physicians and other health care providers against commenters who rate their care on websites, such as Yelp and Health Grades. Indeed, some providers will not treat patients who refuse to sign agreements in which they pledge not to speak about their care publicly. Leticia Miranda, *Yelp’s Warning: This Dentist Might Sue you for Posting a Negative Review*, BuzzFeed (July 25, 2016), <https://www.buzzfeed.com/leticiamiranda/yelp-warns-dentist-may-sue>.

These so-called “gag clauses” are now voided by various federal and state laws. See, e.g., 15 U.S.C. § 45b; Cal. Civ. Code § 1670.8; Md. Code, Com. Law § 14-1325. The federal law, however, does not bar defamation lawsuits based on online comments; instead, it precludes the possibility of a breach of contract lawsuit against the patient. See, e.g., 15 U.S.C. § 45b(b)(2)(B); see also Md. Code, Com. Law § 14-1325.

28. Unless a doctor-plaintiff is Dr. Spock or Dr. Phil, more likely than not he or she will not be a general purpose public figure whose life is open to criticism on any issue. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351-52 (1974) (general purpose public figures are those who have achieved such pervasive fame or notoriety that they are deemed to be public figures for all aspects of their lives). And while not out of the realm of possibility, it is rare for any plaintiff to be found to be an involuntary public figure. *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 742 (D.C. Cir. 1985) (“Involuntary” public figures are those who become well known to the public after being embroiled “through no desire of [their] own” in a public controversy).

29. *Id.* at 741.

30. *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208 (D.C. Cir. 1986).

31. *Id.* at 1211 (citations omitted).

32. *Id.*

33. See, e.g., *Marcone v. Penthouse Int’l Magazine For Men*, 754 F.2d 1072, 1083 (3d Cir. 1985) (“courts have classified some people as limited purpose public figures because of their status, position or associations”); *Patrick v. Cleveland Scene Publ’g LLC*, 582 F. Supp. 2d 939, 952 (N.D. Ohio 2008) (noting that “the nature of the plaintiff’s background and expertise . . . [as] a medical doctor” supported public figure finding), *aff’d*, 360 F. App’x 592 (6th Cir. 2009).

34. *Marcone*, 754 F.2d at 1083-84 (marks and citation omitted).

35. *Id.*

36. 580 F.2d 859 (5th Cir. 1978).

37. *Id.* at 861 (citation omitted).

38. 582 F. Supp. 2d at 951.

39. 181 A.D.2d 192, 194, 197 (N.Y. App. Div. 1992).

40. 749 F. Supp. 987, 988-89 (W.D. Mo. 1990).

41. 215 F.3d 1140, 1145 (10th Cir. 2000); *see also Faltas v. State Newspaper*, 928 F. Supp. 637, 645-46 (D.S.C. 1996) (classifying as a public figure doctor who appeared on local radio programs and wrote an opinion piece for local newspaper), *aff'd*, 155 F.3d 557 (4th Cir. 1998).

42. *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996).

43. 545 N.E.2d 979, 981 (Ill. App. Ct. 1989).

44. 753 A.2d 716, 724 (N.J. Super. 2000).

45. 570 So. 2d 23, 27-28 (La. Ct. App. 1990).

46. 138 P.3d 433, 439 (Nev. 2006).

47. *Id.* at 443.

48. In *Bongiovi*, the court said it was acting “[c]onsistent with the majority of courts” and observed that “a small minority of courts has held that doctors are limited-purpose public figures regardless of whether they have come to the forefront of a debate or a particular issue because the qualifications of doctors are matters of vital importance to the public, or because the doctors have advertised in the yellow pages and received clientele from throughout the United States because of their expertise.” *Id.* at 446 (footnotes omitted).

49. The defendants had alternately sought a stay of the defamation litigation pending the outcome of ongoing malpractice claims, but the court refused to issue the stay.

Stronger Protections Needed to Close Third-Party Subpoena Loopholes

CINDY GIERHART AND ADRIANNA C. RODRIGUEZ

Virtually every newsgathering method at a journalist's disposal today leaves a digital footprint. Phone calls, email messages, text messages, and document transfers all require stops at third-party servers creating a significant challenge to journalists' ability to control and protect sources and newsgathering information. This information, which journalists themselves may be able to protect with a reporter's privilege, is left vulnerable when in the hands of third parties, who can be subpoenaed, in most cases, without the journalist's knowledge.

A recent survey of investigative journalists revealed that 64 percent of those surveyed believe the U.S. government has probably obtained records of their telephone, email, or online communications.¹ Additionally, 80 percent of those surveyed believe their data is more likely to be collected because they are journalists, and 71 percent have "not much or no confidence at all" in their Internet service provider's ability to protect journalists from surveillance or hacking.²

Their fears are not unfounded. In 2013, it was revealed that the federal government had obtained through secret subpoenas telephone records of more than 20 Associated Press phone lines in an attempt to discover who leaked information about a terrorist plot in Yemen.³ The Associated Press was not notified that its records had been seized until one year later.⁴

It was also discovered in 2013 that the government secretly obtained a search warrant for Fox News reporter James Rosen's email messages three years prior.⁵

Similar incidences are also occurring at the state level. In 2014, an Ohio county prosecutor obtained cell phone

records of an Ohio reporter in attempt to discover who revealed information to her about a local sheriff's office. She discovered this only months after the release upon seeing her cell phone records in the prosecutor's report.⁶

Subpoenaing third parties for journalists' records creates an alarming end run around reporter's privilege protections at the state and federal level, and yet only a minority of jurisdictions have taken any steps to close this loophole.

Federal Jurisprudence Lends Little Guidance

Federal case law analyzing protection of journalists' materials in the hands of third parties is sparse. There are just three federal cases deciding the issue, and even though two of those three resulted in forced disclosure of journalists' newsgathering materials, they contain the bedrock of protection against third-party subpoenas for journalists' newsgathering materials.

The D.C. Circuit in *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph* in 1978 easily expressed the most hostility of the three cases toward the notion that journalists have any privilege in protecting their third-party records.⁷ In *Reporters Committee*, various newspaper corporations, organizations, and journalists sought a judicial declaration that two telephone companies be required to give notice to journalists before they release journalists' telephone records to government investigative agencies.⁸ The Court flatly denied this request, finding journalists had no right to resist good-faith subpoenas and no right to have the court screen for bad-faith subpoenas. The decision rested primarily on the court's interpretation of *Branzburg v. Hayes*, which, in the court's view, held that journalists themselves have no right to resist subpoenas for information relating to "good faith felony investigations."⁹ If they have no right to resist their own subpoenas,

they "certainly" have no right to resist third-party subpoenas for the same information, the court found.¹⁰

Yet while the court speaks in sweeping, unforgiving terms about the audacity of journalists to suggest they have any rights above average citizens or rights that may supersede law enforcement efforts, underlying throughout the opinion is restraint, limiting the opinion to the facts in this case.¹¹ From this, a narrow interpretation may emerge, limiting *Reporters Committee* to mean only that where no privilege exists for the journalist, then no privilege exists in the journalist's third-party records. That leaves open the interpretation that, where a privilege does exist, that privilege extends to third-party records. That narrow proposition easily comports with the two other federal cases that found that a privilege exists in journalists' third-party records.

The *Reporters Committee* decision, however, may be more instructive for its dissent than its majority opinion. In his dissent, Chief Judge J. Skelly Wright argues that journalists' First Amendment interests are threatened by the disclosure of telephone records to the government and that subpoenas of journalists' records should be subject to "prior judicial supervision on a case-by-case basis to safeguard that interest."¹²

Notably, Chief Judge Wright argues in his dissent that subpoenas to third parties for journalists' records should be afforded *more* protection than journalists themselves are afforded in grand jury proceedings, because the potential for harm is greater. In a grand jury proceeding, a journalist is limited to testifying in relation to a single crime or under similarly narrow circumstances. In contrast, a subpoena for journalists' telephone records results in the "wholesale disclosure of names, . . . many of whom may be individuals who bear no relation to any potential criminal investigation and thus would never be

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subject to disclosure through grand jury proceedings.”¹³

Emphasizing the severity of harm that may come from third-party subpoenas of journalists’ records, Chief Judge Wright noted that 47 federal government agencies have the power to subpoena journalists’ records, “usually in secret, on their own initiative, and without any judicial control.”¹⁴ And because journalists’ records are often subpoenaed without notice to the journalist, the journalist is not afforded the opportunity to contest the subpoena in court – a right that belongs to the journalist even under the majority’s interpretation of *Branzburg*.¹⁵

In a more recent case, the Second Circuit held that a reporter’s privilege extends to records held by third-party providers when “the third party plays an ‘integral role’ in reporters’ work.”¹⁶ Because the telephone is “without question” an essential tool of journalism and plays an integral role in gathering information, any reporter’s privilege afforded to a journalist extends to the journalist’s telephone records.¹⁷ Ultimately, however, the court found that the government was able to overcome a common law qualified privilege, and the telephone records were ordered to be released.

Finally, a California district court is the only federal court to find that not only was the journalist protected by a reporter’s privilege but also, by extension, the journalist’s records in the hands of a third party were also protected.¹⁸ In *Feist*, a counterclaimant sought records from a journalist in connection with a defamation claim against the journalist’s source (the journalist was not a party to the lawsuit) and from the Electronic Frontier Foundation (EFF), also in connection with the defamation claim.¹⁹ A magistrate judge of the district court quashed the subpoena against the journalist pursuant to a reporter’s privilege²⁰ but did not quash the subpoena against EFF. The magistrate judge’s decision was appealed to a district court judge, who briefly concluded without much analysis that the party seeking the records “should not be allowed to avoid the consequences” of the quashed journalist’s subpoena

“by seeking the same documents from EFF.”²¹

DOJ Attorney General Media Guidelines

In 2013, in the wake of news that the government had obtained telephone records from more than 20 Associated Press phone lines and obtained a search warrant for a Fox News reporter’s email – all without the journalists’ knowledge – then-Attorney General Eric Holder announced plans to revise the Department of Justice’s media subpoena guidelines.²²

One of the most significant changes to come from revising the guidelines was to reverse the presumption concerning notice: previously, the government’s default was *not* to give notice to journalists of third-party subpoenas unless it would not threaten an investigation.²³ The revised guidelines flipped the presumption so that notice is *required* in *all* circumstances, and only the Attorney General may determine, “for compelling reasons,” that notice may be withheld in certain circumstances.²⁴

While the change to the guidelines was undoubtedly a step in the right direction, the guidelines are policy, not law. Given the recent change in administration, the new attorney general – who, as a senator, voted against advancing the 2013 federal shield bill, which contained identical language on notice as in the guidelines²⁵ – could easily retool the media subpoena guidelines, removing the gains for journalists that were so hard fought.

Federal Shield Bill

While journalists remain without a shield law at the federal level, the last federal shield bill, which was introduced in 2013,²⁶ contained provisions explicitly extending, with limited exceptions, the privilege to “any document or other information from the account of a” journalist in the hands of a third-party service provider.²⁷ The bill also required notice to the journalist and opportunity to be heard,²⁸ except where a judge determines by clear and convincing evidence that notice “would pose a clear and substantial threat to the integrity of a criminal investigation, would risk grave harm to national secu-

urity, or would present an imminent risk of death or serious bodily harm.”²⁹

Few Protections Exist at the State Level

Across the country, 39 states and the District of Columbia have adopted shield laws protecting reporters from compelled disclosure of their source and newsgathering information.³⁰ The persons and/or entities covered under each state’s shield law and the information that is privileged varies widely from state to state.

In some states, like Illinois, the privilege covers a “reporter,” which is narrowly defined as “any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis.”³¹ Other states, like Nebraska, extend the privilege to any person or entity, whether domestic or foreign, that is “engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public.”³²

Similarly, little uniformity exists in the information protected from compelled disclosure under each state’s shield law, with some statutes providing absolute protection of all published and unpublished newsgathering and source information,³³ and others narrowly providing only a qualified privilege against the compelled disclosure of confidential source information.³⁴

Of the states with shield laws, seven provide some level of protection against subpoenas to third parties for journalists’ information. The provisions have all been adopted in the last decade as either an amendment to existing shield law provisions or as part of newly enacted shield laws in states that previously had none.

Shield Laws Prohibiting Subpoenas to Third Parties

Three states—Montana, Wisconsin, and Texas—contain prohibitions against subpoenas to third parties for journalist records.

In 2015, Montana extended the absolute privilege against compelled disclosure of “any information obtained or prepared [by a journalist] or the source of that information”³⁵ in its Media Confidentiality Act to information

held by an “electronic communication service.”³⁶ Specifically, the amendment provides that an “electronic communication service,” defined as “a service used to send, receive, transmit, store, or facilitate electronic communications,”³⁷ may not be held in contempt for refusing to disclose journalists’ information in its possession.³⁸ The Act further prohibits “[a] judicial, legislative, administrative, or other governmental body” from requesting or requiring that an “electronic communication service” disclose privileged information.³⁹ These protections created what many consider the strongest shield law in the country.⁴⁰

Wisconsin’s shield law, adopted in 2010, absolutely prohibits the issuance of subpoenas to third parties for confidential source and newsgathering information:

No person having the power to issue a subpoena may issue a subpoena to compel a person other than a news person to testify about or produce or disclose, information, records, or communications relating to a business transaction between that person and the news person if the purpose of the subpoena is to discover [the identity of a confidential source, information that would tend to identify a confidential source, or confidential news or information].⁴¹

The statute further makes inadmissible for any purpose “any news, information, records, communications, or the identity of a source of any news or information obtained in violation of this section.”⁴²

The Texas shield law, known as the Texas Free Flow of Information Act, was passed in 2009 and provides a qualified privilege in criminal and civil cases.⁴³ The law also prohibits subpoenas to communication service providers.

A subpoena or other compulsory process may not compel the parent, subsidiary, division, or affiliate of a communication service provider or news medium to disclose the information, documents, or items or the source of any information, documents, or items that are privileged from disclosure [].⁴⁴

No published decisions have yet ap-

plied the provisions against third-party subpoenas in these shield laws.

Shield Laws Requiring Notice When Subpoenaing Third Parties

Another four states—California, Connecticut, Maine, and Washington—require a journalist be given notice and an opportunity to oppose a subpoena to a third party. While these provisions do not prohibit subpoenas to third parties, they provide journalists time to work with the subpoenaing party to narrow or rescind it, or to involve the courts.

Spurred by the secret subpoenaing of the Associated Press phone records in 2013 by the Department of Justice,⁴⁵ California strengthened its shield law to require that journalists receive five days’ notice before a subpoena is issued to a third party.⁴⁶ The notice must include “at a minimum, an explanation of why the requested records will be of material assistance to the party seeking them and why alternative sources of information are not sufficient to avoid the need for the subpoena.”⁴⁷ The requirement applies in all but exceptional circumstances.⁴⁸ The amendment was sponsored by the California Newspaper Publishers Association.⁴⁹ It passed both houses of the California Legislature unanimously and became effective on January 1, 2014. In a press release following the passage of the bill, Sen. Ted Lieu, the bill’s author and sponsor, noted that “Today’s bipartisan vote makes it clear: California will protect the First Amendment.”⁵⁰

Connecticut’s, Maine’s, and Washington’s shield laws—adopted in 2006, 2008 and 2007, respectively—contain nearly identical provisions requiring journalists “be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard” when a third party will be subpoenaed for the purpose of discovering the identity of a source or other newsgathering information protected by each state’s shield law.⁵¹ While all three states’ notice provisions contain nearly identical language, Connecticut’s shield law importantly goes one step further in

establishing that “[a]ny information obtained in violation of the provisions of this section, and the identity of the source of such information, shall be inadmissible in any action, proceeding or hearing before any judicial, executive or legislative body.”⁵²

Republic of Kazakhstan v. Does 1-100

In a matter of first impression, in *Republic of Kazakhstan v. Does 1-100*, the Court of Appeals in Washington, Division 1, applied Washington’s shield law and quashed a subpoena seeking source information to a domain registration company.⁵³ After *Respublika*, an online newspaper, published leaked emails from high-ranking Kazakh officials, the Kazakh government sought to subpoena eNom, Inc., which is located in Kirkland, Washington, seeking “the IP and Mac addresses [of the registrant for *Respublika*’s website] to cross-reference against IP addresses that accessed Kazakh government servers at the time of the alleged hacking . . . and . . . the domain name registrants’ identities . . . to . . . ‘confirm who hacked into Kazakhstan’s computers and stole privileged documents.’”⁵⁴ The newspaper moved to quash the subpoena. After the trial court denied the motion, the Court of Appeals reversed, holding that Washington’s shield law prohibited the subpoena, because regardless of whether the government sought to establish that the registrants were the hackers or that they had information that could lead to the hackers, either purpose sought privileged source information prohibited from disclosure under Washington law.⁵⁵

Conclusion

More is needed at the federal and state level to ensure hard-fought protections for journalists’ newsgathering materials are not eroded through end runs around reporter’s privilege protections. Without a federal shield law, the foundation for protecting journalists’ records in the hands of third parties is shaky and, in most jurisdictions, largely dependent on varying strengths of support in the courts for a reporter’s privilege generally.

At the state level, few states have included any third-party protections

in their shield statutes, though they are slowly increasing with each amendment and newly introduced statute. States need to increase this trend, enacting absolute privileges against third-party subpoenas for journalists' records, where possible. Otherwise, notice provisions are an important step toward ensuring journalists have the opportunity to contest a third-party subpoena in court. Additionally, provisions that make inadmissible improperly obtained journalists' records from third parties provide additional protections, even when notice provisions are not followed.

Given the uncertainties in the federal landscape, it is now more important than ever to achieve consistent and strong protections at the state level and to aggressively seek to enforce those protections.

Endnotes

1. Jesse Holcomb, Amy Mitchell, & Kristen Purcell, *Investigative Journalists and Digital Security*, Pew Research Center (Feb. 5, 2015), www.journalism.org/2015/02/05/investigative-journalists-and-digital-security (last visited Feb. 28, 2017).

2. *Id.*

3. *Gov't obtains wide AP phone records in probe*, Associated Press (May 13, 2013), www.ap.org/ap-in-the-news/2013/govt-obtains-wide-ap-phone-records-in-probe (last visited Feb. 28, 2017).

4. *Id.*

5. Ann E. Marimow, *A rare peek into a Justice Department leak probe*, Washington Post (May 19, 2013), https://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_story.html?hpid=z2&tid=a_inl&utm_term=.c6b0fe33e977 (last visited Feb. 28, 2017).

6. Michael Lambert, *Stopping an end-run around the reporter's privilege*, News Media & the Law (Winter 2016), www.rcfp.org/browse-media-law-re-sources/news-media-law/news-media-and-law-winter-2016/stopping-end-run-around-rep (last visited Feb. 28, 2017).

7. *Reporters Comm. v. Am. Tele-*

phone Telegraph, 593 F.2d 1030, 1049 (D.C. Cir. 1978) (deriding the "claim that journalists have the *unprecedented privilege* of suppressing the records and testimony of third parties to whom they and their sources have *carelessly revealed incriminating information*") (emphasis added).

8. *Id.* at 1038.

9. *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)). The court's interpretation of *Branzburg* is far narrower than most other circuits' interpretations—and, in fact, even narrower than its own interpretation in later cases. See *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998) (noting journalist's privilege exists in both civil and criminal cases); *Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993) (interpreting *Branzburg* as establishing a qualified privilege for journalists); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) ("The Court [in *Branzburg*] recognized, however, that a qualified privilege may be proper in some circumstances because newsgathering was not without First Amendment protection."); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (interpreting *Branzburg* as requiring a balancing of interests to determine whether a journalist may be compelled to disclose confidential information); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980) (finding reporters have a First Amendment privilege to protect the identity of confidential informants); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) (finding the First Amendment requires a weighing of interests). See *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (finding the Court in *Branzburg* "indicated that a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify" and citing with favor the balancing test in Justice Powell's concurring opinion).

10. *Reporters Com.*, 593 F.2d at 1050.

11. *Id.* at 1053, 1053 n.75 (finding that "journalists *in this context* have no 'First Amendment interest' in third-party records" and that "the subpoena practices *reflected in this record* do not abridge the right to gather information" based on "the *factual circumstances* of this case") (emphasis added).

12. *Id.* at 1083.

13. *Id.* at 1085.

14. *Id.* at 1086.

15. *Id.* at 1087.

16. *The New York Times Co. v. Gonzales*, 459 F.3d 160, 168 (2d Cir. 2006).

17. *Id.* The court in *Gonzales* attempts to distinguish its holding from *Reporters Committee*, 593 F.2d at 1048–49, by arguing in dicta that the airline, taxicab, and hotel records the government sought in connection with a journalist's meeting with a source in *Reporters Committee* were not as integral to journalists' work as a telephone, *Gonzales*, 459 F.3d at 168 n.3. This is another potential avenue for limiting the reach of *Reporters Committee*.

18. *Feist v. RCN Corp.*, No. 12-MC-80135 SI, 2012 WL 5412362, at *6 (N.D. Cal. Nov. 6, 2012).

19. *Id.* at *2.

20. The California court applied New York's qualified privilege, because the underlying litigation in this case was in New York; the subpoenas were directed at California individuals or entities, which is what brought this matter to the California district court.

21. *Id.* at *6.

22. See *Amending the Department of Justice subpoena guidelines*, Reporter's Comm. Freedom Press, www.rcfp.org/attorney-general-guidelines.

23. *Summary of changes to the Attorney General guidelines*, Reporter's Comm. Freedom Press, July 30, 2013, www.rcfp.org/sites/default/files/docs/RCFP%20summary%20of%20AG%20Report-1.pdf.

24. 28 CFR 50.10(e)(2). Specifically, notice may be withheld if it "would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm." *Id.*

25. S. Rep. No. 113-118, at 16, 47, 55 (2013). Then-Sen. Jeff Session's ob-

jections to the shield bill were centered around national security concerns and his aversion to shielding leakers of classified documents. *Id.* at 25–53.

26. Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013). The bill passed the Senate Judiciary Committee and was favorably recommended to the full Senate on November 6, 2013, where it ultimately stalled.

27. *Id.* at § 6(a)(1).

28. The Senate Judiciary Committee Report clarified that portions of the shield bill *were* meant to preempt portions of the Electronic Communications Privacy Act (ECPA). Specifically, whereas the ECPA premises notice for third-party subpoenas on the type of record sought, the shield bill required notice to journalists for *any* type of record. Furthermore, the ECPA allows 90-day delayed notice plus unlimited 90-day extensions. The shield bill permitted only an initial 45-day delayed notice for cause plus only one additional 45-day extension. S. Rep. No. 113-118, at 20 (2013).

29. S. 987, § 6(b), (c). This language is almost identical to the notice exception in the Attorney General’s media subpoena guidelines.

30. Alabama, Ala. Code § 12-21-142; Alaska, Alaska Stat. 09.25.300 to .390; Arizona, Ariz. Rev. Stat. Ann. §§ 12-2237, 12-2214; Arkansas, Ark. Code Ann. § 16-85-510; California, Cal. Evid. Code § 1070, Cal. Civ. Proc. § 1986.1; Colorado, Colo. Rev. Stat. § 13-90-119 (judicial proceedings), Colo. Rev. Stat. §§ 24-72.5-101 to 106 (administrative proceedings); Connecticut, Conn. Gen. Stat. § 52-146t; Delaware, Del. Code tit. 10, § 4320-26; District of Columbia, D.C. Code § 16-4701 to 4704; Florida, Fla. Stat. Ann. § 90.5015; Georgia, Ga. Code Ann. § 24-5-508; Illinois, 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Indiana, Ind. Code §§ 34-46-4-1, 34-46-4-2; Kansas, Kan. Stat. Ann. § 60-481; Kentucky, Ky. Rev. Stat. Ann. § 421.100; Louisiana, La. Stat. Ann. § 45:1451-59; Maine, Me. Rev. Stat. Ann. tit. 16, § 61; Maryland, Md. Cts. & Jud. Proc. Code Ann. § 9-112; Michigan, Mich. Comp. Laws 767.5a (grand jury proceedings) and Mich. Comp. Laws 767A.6 (subpoenas issued by prosecu-

tors); Minnesota, Minn. Stat. Ann. 595.021 to .025; Nebraska, Neb. Rev. Stat. §§ 20-144 to 147; Nevada, Nev. Rev. Stat. Ann. 49.275; New Jersey, N.J. Stat. Ann. 2A:84A-21 to 21.8; New Mexico, N.M. Stat. Ann. § 38-6-7, N.M. Rules Ann. 11-514; New York, N.Y. Civ. Rights Law § 79-h; North Carolina, N.C. Gen. Stat. § 8-53.11; North Dakota, N.D. Cent. Code § 31-01-06.2; Ohio, Ohio Rev. Code § 2739.04 (broadcasters), Ohio Rev. Code § 2739.12 (newspapers); Oklahoma, Okla. Stat. Ann. tit. 12, § 2506; Oregon, Or. Rev. Stat. § 44.510 to 540; Pennsylvania, 42 Pa. Cons. Stat. § 5942; Rhode Island, R.I. Gen. Laws § 9-19.1-1 to -3; South Carolina, S.C. Code Ann. § 19-11-100; Tennessee, Tenn. Code Ann. § 24-1-208; Texas, Tex. Civ. Prac. & Rem. Code § 22.021-24 (civil), Tex. Code Crim. Proc. Ann. art. 38.11 and 38.111 (criminal); Utah, Utah R. Evid. 509; Washington, Wash. Rev. Code Ann. § 5.68.010; West Virginia, W. Va. Code § 57-3-10; and Wisconsin, Wis. Stat. Ann. § 885.14. In 2013, Hawaii let its shield law expire, and attempts to enact a new one have failed. *See* Jack Komperda, *Hawaii shield law will expire after lawmakers unable to reconcile competing bills*, Reporters Comm. Freedom Press, <https://www.rcfp.org/browse-media-law-resources/news/hawaii-shield-law-will-expire-after-lawmakers-unable-reconcile-compe> (last viewed Feb. 20, 2017); Rein Terrado, *Hawaii Shield Law Resuscitated*, Courthouse News Service, <http://www.courthousenews.com/2015/02/26/hawaii-shield-law-resuscitated.htm> (last viewed Feb. 20, 2017).

31. 735 Ill. Comp. Stat. Ann. 5/8-902; *see also* Nev. Rev. Stat. Ann. § 49.275 extending the privilege to any “reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station.”

32. Neb. Rev. Stat. Ann. §§ 20-145, 20-146. *See also* W. Va. Code Ann. § 57-3-10 extending the privilege to any “reporter,” defined as anyone “who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns matters of public interest for dissemination to the public

for a substantial portion of the person’s livelihood, or a supervisor, or employer of that person in that capacity” and students.

33. *See* Nev. Rev. Stat. Ann. § 49.275 providing an absolute privilege against the compelled disclosure of “any published or unpublished information” or the source of any information obtained in the newsgathering process in any legal proceeding before any court, the legislature, or any department or agency of the state government or any local government. However, the Nevada Supreme Court stated, in dicta, in *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50, 59 (2000), that “although the news shield statute provides an absolute privilege to reporters engaged in the newsgathering process, there may be certain situations, e.g., when a defendant’s countervailing constitutional rights are at issue, in which the news shield statute might have to yield so that justice may be served.”

34. *See* Kan. Stat. Ann. § 60-482 providing a qualified privilege for “previously undisclosed information or the source of any such information.” *See also* N.C. Gen. Stat. Ann. § 8-53.11 providing a qualified privilege against disclosure of “any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist.”

35. Mont. Code Ann. § 26-1-902.

36. *Id.* § 26-1-902 (2) (“A [journalist] or an electronic communication service used by that person may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to issue subpoenas for refusing to disclose or produce the source of any information or for refusing to disclose any information obtained or prepared in gathering, receiving, or processing information in the course of the person’s business.”)

37. *Id.* § 26-1-902 (4).

38. *Id.*

39. *Id.* § 26-1-902 (3).

40. Soo Rin Kim, *Montana shield law expanded to forbid government subpoenas of third-party records*, Reporters Comm. Freedom Press, www.rcfp.org/browse-media-law-resources/news/montana-shield-law-expanded-forbid-gov-

ernment-subpoenas-third-party- (last visited Feb. 19, 2017).

41. Wis. Stat. Ann. § 885.14 (3) Wisconsin Assembly Amendment Memo, 2009 Reg. Sess. A.B. 333 (“This might apply, for example, to attempts to obtain phone records or hotel records involving the news person from the phone company or hotel.”)

42. Wis. Stat. Ann. § 885.14.

43. Texas Civ. Prac. & Rem. Code §22.021-22.027 and Texas Code of Criminal Procedure arts. 38.11, 38.111.

44. Tex. Civ. Prac. & Rem. Code Ann. § 22.023(b); Tex. Code Crim. Proc. Ann. art. 38.11, sec. 3(b). The statutes define a “communication service provider” as “a person or the parent, subsidiary, division, or affiliate of a person who transmits information chosen by a customer by electronic means, including: (A) a telecommunications carrier, as defined by Section 3, Communications Act of 1934 (47 U.S.C. Section 153); (B) a provider of information service, as defined by Section 3, Communications Act of 1934 (47 U.S.C. Section 153); (C) a provider of interactive computer service, as defined by Section 230, Communications Act of 1934 (47 U.S.C. Section 230); and (D) an information content provider, as defined by Section 230, Communications Act of 1934 (47 U.S.C. Section 230).” Tex. Civ. Prac. & Rem. Code Ann. § 22.021(1); Tex. Code Crim. Proc. Ann. art. 38.11, sec. 1.

45. See S.B. 558, 2013-2014 Reg. Sess. (Cal. 2013).

46. Cal. Civ. Proc. Code § 1986.1 (b)(2) (“To protect against the inadvertent disclosure by a third party of information protected by Section 2 of Article I of the California Constitution, a party issuing a subpoena in any civil or criminal proceeding to a third party that seeks the records of a journalist shall, except in circumstances that pose a clear and substantial threat to the integrity of the criminal investigation or present an imminent risk of death or serious bodily harm, provide notice of the subpoena to the journalist and the publisher of the newspaper, magazine, or other publication or station operations manager of the broadcast station that employs or contracts with

the journalist, as applicable, at least five days prior to issuing the subpoena. The party issuing the subpoena shall include in the notice, at a minimum, an explanation of why the requested records will be of material assistance to the party seeking them and why alternate sources of information are not sufficient to avoid the need for the subpoena.”).

47. *Id.* § 1986.1 (b)(2).

48. *Id.*

49. S.B. 558.

50. *Gov. Brown Signs Journalist Protection Bill*, The Argonaut (Oct 9, 2013), <http://argonautnews.com/gov-brown-signs-journalist-protection-bill/>.

51. Conn. Gen. Stat. Ann. § 52-146t (f). See also Me. Rev. Stat. tit. 16, § 61 (3) (“Whenever a subpoena is issued to, or other compulsory process is issued against, a 3rd party that seeks records, information or other communications on business transactions with the journalist, the affected journalist must be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated and an opportunity to be heard.”); Wash. Rev. Code Ann. § 5.68.010 (3) (“Whenever a subpoena is issued to, or other compulsory process is initiated against, a nonnews media party where such subpoena or process seeks information or communications on business transactions with the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard.”).

Connecticut’s shield law provides a qualified privilege for confidential information and sources. Conn. Gen. Stat. Ann. § 52-146t (b). The statute further requires the subpoenaing party to engage in negotiations with the news media prior to issuing the subpoena or initiating compulsory process. *Id.* § 52-146t (c). Maine provides a qualified privilege for confidential source and information. Me. Rev. Stat. tit. 16, § 61 (1). Washington provides an absolute privilege for confidential source information and a qualified privilege for unpublished information. Wash. Rev. Code Ann. § 5.68.010 (1). Maine and Washington additionally provide that

“[i]n the event that the subpoena to, or other compulsory process against, the nonnews media party is in connection with a criminal investigation in which the news media is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.” Wash. Rev. Code Ann. § 5.68.010 (3). See Me. Rev. Stat. tit. 16, § 61 (3).

52. Conn. Gen. Stat. Ann. § 52-146t (h).

53. *Republic of Kazakhstan v. Does 1-100*, 192 Wash. App. 773, 786, 368 P.3d 524, 530 (2016).

54. *Id.* at 785.

55. *Id.*

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“Regardless of Physical Form”: Legal and Practical Considerations Regarding the Application of State Open-Records Laws to Public Business Conducted by Text Message

HELEN VERA

Introduction

In 2010, the city of San Jose, California, adopted a policy that applies California’s Public Records Act to text messages sent or received by city officials in the course of public business, including those on personal devices.¹ The policy was lauded by open-government advocates as a model for bringing state open-government law into the twenty-first century. Although many state open-records laws, including California’s Public Records Act, by their plain terms apply to text messages, San Jose’s policy attempted to resolve practical confusion regarding public access to such communications. Not surprisingly, within a year a dispute arose, with a local activist requesting text messages sent and received by the San Jose mayor and other public officials in relation to a real estate development—and the city denying the request because the messages were on personal devices not in the city’s possession. In the ensuing legal battle, a local judge granted summary judgment in favor of releasing the messages; in the city’s appeal the order was reversed.² On March 2, 2017, the California Supreme Court overturned that reversal, holding “that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act,” and the opinion explicitly noted that the “writings” at issue included text messages.³

The ruling is significant, because it applies existing public access laws to new technologies in a way that vindicates their underlying open-government

purposes and may serve as a national model, but also in line with decades of court precedent—if not actual practice. Since 1967, with the enactment of the federal Freedom of Information Act (“FOIA”), the American public has had a right to access federal government agency records, subject to certain exemptions based on personal privacy, national security, law enforcement, trade secrets, and other discrete categories.⁴ Today, FOIA is a cornerstone of government transparency and accountability. The statutory definition of “records” subject to FOIA is broad, including:

all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.⁵

In short, the law provides a right to access records related to federal agency business—regardless of the medium in which official business is done. In addition to the federal FOIA, every state also has some form of open-government law, most with similar scope.

In the decades since FOIA’s enactment, incredible unforeseen advances have occurred in technology and electronic communication—advances with which agency compliance has yet to catch up. Application of FOIA’s document retention and access requirements to communications such as emails and text messages remains subject to con-

fusion and challenge by public bodies, and compliance with FOIA requests for these types of records is inconsistent. For example, in 2015, following a drawn-out dispute with Congress over requests for communications of Environmental Protection Agency (“EPA”) head Gina McCarthy, the EPA released extensive text messages but still disputed the argument that the text messages were agency records subject to FOIA.⁶ Most federal agencies to have directly addressed the question have concluded that electronic records, including text messages, are subject to FOIA. Notably, the National Archives and Records Administration (“NARA”), which issues guidance for other federal agencies to assist them in interpreting their responsibilities under FOIA, in 2015 issued a bulletin that lists text messages as federal records, even when the messages are created in or sent to personal accounts or devices.⁷ The Department of Homeland Security (“DHS”) appears to follow similar guidelines, as a toolkit published on the agency’s website explicitly discusses FOIA obligations related to emails, and instructs employees to err on the side of treating communications as records when in doubt.⁸ Despite these attempts, some other federal agencies have either remained silent on the issue or have published conflicting opinions.⁹

Text messages present unique challenges in the context of open-records laws—and these challenges are equally confounding at the state level.¹⁰ This article surveys state open-records, open-meetings, and freedom of information laws, regulations, and policies, and provides an overview of practical application of these laws to text messages. The first section surveys the

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current state statutory and administrative landscape in the applicability of state open-records laws to text messages, concluding that, in most states, there is a clear right to access text messages from public officials, even on personal cell phones or devices, as long as the messages otherwise meet the statutory definition of a public record. The second section surveys state attorney general and other agency opinions that have reached similar conclusions. The third section then reviews access to text messages in practice, including in litigation to compel access, and assesses the logistics of retention, production, and possession of text messages as public records. The article concludes with a survey of issues on the horizon, such as the treatment of social media accounts and messaging apps under open-records laws.

Statutory Texts: A Survey of State Open-Records Laws as Applicable to Text Messages

Among state open-records laws, a handful apply to text messages explicitly. More common are laws applying to writings, communications, or other records that pertain to official state or agency business and are sent or received by public officials—often mirroring the federal FOIA’s language providing that records may be subject to the law “regardless of physical form,” and sometimes specifically applying to electronic records. In a majority of states, there is thus a statutory right to access communications including text messages sent or received by public officials and relating to official business.

Statutory Provisions Expressly Applying to Text Messages

In at least three states, text messages are explicitly included within the purview of state open-records laws, either under the statute itself or by regulation. The Texas Public Information Act, which was originally passed in 1993 and amended in 2013 to explicitly apply to text messages, carries the strongest provision:

the general forms in which the media containing public information exists include a book, paper, letter,

document, email, Internet posting, *text message*, instant message, other electronic communication, printout, photograph, film, tape, microfiche, microfilm, Photostat, sound recording, map, and drawing and a voice, data, or video representation held in computer memory.¹¹

This explicit inclusion of text messages and other electronic communications was precipitated by disputes as to whether the statute applied to such communications. Before the statute itself was amended, the question had been raised in a dispute over access to text messages and emails between City of San Juan commission members, the city secretary, and senior personnel.¹² In the context of the dispute, then-Attorney General Greg Abbott (now governor), a Republican, issued a formal letter interpreting the statute at the time, concluding that text messages are subject to the law, just as any other format of record:

to the extent the requested cellular telephone text messages and e-mails maintained by the individuals at issue relate to the official business of the city, they are subject to the [Texas Public Information] Act. To the extent the cellular telephone text messages and e-mails do not relate to the official business of the city, they are not subject to the Act and need not be released.¹³

The eventual amendment of the Texas Public Information Act would bring the statute into explicit alignment with this interpretation of the preceding version of the statute, providing a potential model for other states that hope to update current open-records laws to reflect the realities of modern communication.¹⁴

Georgia and New Mexico have also explicitly included text messages, by, respectively, statutory amendment and regulation. Under Georgia’s Open Records Act, public record has long been defined broadly, and in 2012, revisions to statutory provisions discussing the content of requests included text messages:

Requests to inspect or copy electronic messages, whether in the form of

e-mail, *text message*, or other format, should contain information about the messages that is reasonably calculated to allow the recipient of the request to locate the messages sought, including, if known, the name, title, or office of the specific person or persons whose electronic messages are sought and, to the extent possible, the specific data bases to be searched for such messages.¹⁵

In addition to these statutory provisions in Texas and Georgia, New Mexico has explicitly addressed text messages in administrative regulations promulgated by the New Mexico Commission of Public Records. The regulations require that compliance with the Public Records Act, which defines public records broadly, includes retaining “electronic messages,” including “a *text message*, social media and e-mail that is created and delivered in an electronic format. . . . [E]lectronic messages must be managed pursuant to established record retention and disposition schedules”¹⁶

In Kansas, recent statutory revisions provide additional support to an interpretation that the Kansas Open Records Act applies to text messages, even though the statute does not facially address texts. The law previously excluded emails on personal computers and accounts, even if they were sent between public officials regarding public business. The statute was amended in 2016 to eliminate the exclusion for personal emails,¹⁷ a change which the University of Kansas has interpreted to bring private email, text messages, “and perhaps even voice messages” into the scope of the statute.¹⁸

Not every state to consider the issue has adopted similar amendments. In South Dakota, a bill that would have amended the state’s Open Meetings Law to include text messages in the law’s definition of a teleconference—thus requiring retention of and access to text message discussions by a quorum of a governmental body and relating to public business—was considered during the 2015 legislative term but died in committee.¹⁹ The bill, which resulted from a proposal of a 2012 Open Government Task Force in the

state, failed despite significant support from the public and the state Attorney General.²⁰

Uncommon, but not unheard of, are initiatives to expressly limit state open-records laws so that they categorically exclude certain formats of communications. In 2011, based largely on privacy concerns, state legislators in Utah passed a bill modifying the state's Government Records Access and Management Act to explicitly exclude text messages from the definition of a public record;²¹ the bill was quickly repealed following strong public opposition.²² The question of whether and how the law should treat text messages remains unresolved.²³ Under the current law, Utah excludes from the definition of "record" "a personal note or personal communication prepared or received by an employee or officer of a governmental entity . . . in a capacity other than the employee's or officer's governmental capacity; or . . . that is unrelated to the conduct of the public's business," as well as "material that is legally owned by an individual in the individual's private capacity."²⁴ While this exception would carve out personal text messages, it leaves room for public access to text messages related to public duties.

As more states grapple with open-records requests to access text messages, similar amendments may be proposed around the country. And while the overall trend is toward providing access, the experiences in Utah and South Dakota highlight potential pitfalls in attempting to improve access to public records by directly amending statutes. Indeed, in a majority of states, broad public-records laws are most clearly interpreted to already apply to records in any form—without a need to expressly reference text messages or other new technologies in the statutory texts.

Broad Statutory Definitions of Public Records

In many states, statutory definitions of public records are sufficiently broad to establish a right to access text messages relating to public business.

Broad Definitions of Public Records Expressly Including Electronic Records

At least seventeen state open-re-

ords laws explicitly include electronic media in broad definitions of public records. As a general matter, these state laws' applicability to certain records is determined based on the content of the record—that is, on whether it relates to public business—rather than on the format or medium. For example, in Illinois, whether a record is subject to public access is determined based on whether it "pertains to the transaction of public business," and the statutory language expressly includes electronic messages.²⁵ The most straightforward interpretation of these laws suggests that they apply to relevant text messages, including those stored on personal devices. Simply put, there is no reason why a categorical exception would apply to text messages. In some cases, the statutory text directly includes electronic "correspondence," as in the Colorado Open Record Act, which defines public records to include "writings," including "the correspondence of elected officials," and includes "digitally stored data, including without limitation electronic mail messages . . . transmitted between two or more computers or electronic terminals."²⁶ Several other state statutes include less specific descriptions of electronic records.²⁷

Echoing the federal FOIA's language, many of these statutes also specify that a document may be a public record regardless of its physical form or medium. For example, Virginia's Freedom of Information Act defines "public records" to include "all writings and recordings," "regardless of physical form or characteristics":

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, type-writing, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and *regardless of physical form or characteristics*, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. Records that are not prepared for or used in the transaction of public busi-

ness are not public records.²⁸

Several other state statutes employ similar verbiage: the Alaska Records Management Act (a public record may take any of a variety of formats, including any "electronic record, or other document of any other material, regardless of physical form or characteristic"),²⁹ the Louisiana Public Records Act (applying to documents "regardless of physical form or characteristics, including information contained in electronic data processing equipment"),³⁰ the Maryland Public Information Act (defining "public record" as being in "any form" including "a computerized record"),³¹ the New Hampshire Right-to-Know Law (applying to "governmental records . . . whether in paper, electronic, or other physical form"),³² the Ohio Public Records Act (applying to "any document, device, or item, regardless of physical form or characteristic, including an electronic record"),³³ and the Rhode Island Access to Public Records Act (defining "public records" to include "computer stored data (including electronic mail messages, except specifically for any electronic mail messages of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities) or other material regardless of physical form or characteristics").³⁴ The Tennessee Open Records Act defines "public record" to include "all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics" and additionally provides that the definition "shall be broadly construed so as to give the fullest possible public access to public records"), further bolstering an interpretation that there is no categorical exclusion for text messages.³⁵ The plain language of these statutes supports their broad application to any form of communication, including text messages.

Statutory Definitions Sufficiently Broad to Establish a Right to Access Text Messages

Additional state laws are sufficiently

broad that they are most reasonably understood to apply to relevant text messages, even though they do not explicitly reference electronic messages or records. For example, under Massachusetts law, although there is no explicit reference to text messages or electronic records, text messages related to public business would appear to be accessible, as public records include

documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision . . .³⁶

A number of other state statutes define public records in similarly broad strokes; almost all of these statutes also include provisions specifying that records may be considered public records regardless of physical form. For example, Connecticut law defines “public records” to include “any recorded data or information relating to the conduct of the public’s business . . . whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.”³⁷ Under the Mississippi Public Records Act, public records are defined to include “all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.”³⁸ Un-

der Idaho law “public records” include “any writing” relating to public business “prepared, owned, used or retained” by a public body “regardless of physical form or characteristics.”³⁹ Other states with similar provisions include Iowa,⁴⁰ Kentucky,⁴¹ Nebraska,⁴² New York,⁴³ North Carolina,⁴⁴ Michigan,⁴⁵ Oklahoma,⁴⁶ Oregon,⁴⁷ Pennsylvania,⁴⁸ South Carolina,⁴⁹ Vermont,⁵⁰ and Washington State.⁵¹

Because text messages are often sent and received on personal devices and thus not in a state’s possession, application of open-records laws can present practical challenges. Mitigating this difficulty somewhat, some statutes expressly contemplate that records need not be in the custody of the state to be considered public records. The Delaware Freedom of Information Act defines public records broadly and expressly applies to emails and other records not in the custody of the public body.⁵² Missouri’s Sunshine Law requires transmission of “any message relating to public business by electronic means” to a public office computer or to the state custodian of records—so, although under the statute public records include “electronically stored” records “retained by or of any public governmental body,” under the statute relevant records would meet this definition because their retention would be required.⁵³ Presumably, this means that Missouri officials must retain and make accessible any text messages relating to public business. Many statutes are silent on this question of whether custody or possession of a record is necessary,⁵⁴ while a number of statutes include state possession as a factor of the definition of public records.⁵⁵ As explored below, these possession provisions can pose significant challenges in attempts to obtain text messages through open-records requests.

Official State Attorney General Opinions and Other Agency Interpretations

Many state attorneys general, archival agencies, legislatures, or other official bodies have issued binding opinions, formal statements, and other guidance providing that text messages can be public records under existing

laws. Although in many cases these guidances recognize a clear right of access, practical implementation challenges persist.

Attorney General Opinions

In several states, attorneys general have issued formal opinions concluding that text messages may be public records subject to open-records laws’ requirements to retain and, when requested, produce records. State attorneys general have been grappling with these questions for several years, and many have issued formal opinions or other guidelines specifying that text messages fall within interpretation of the relevant statute. Often, these opinions have been issued in response to disputes on this precise question, resolving practical cases in favor of production of text messages. In some cases, state attorneys general have specifically included messages sent or received by private phones. In a binding “Public Access Opinion” issued in 2011, the Illinois attorney general considered the question in detail after the city of Champaign challenged a media request under the state FOIA for records including text messages sent and received on public officials’ personal devices.⁵⁶ The attorney general concluded that text messages could be public records under the law. Two analyses informed this finding. First, the attorney general reasoned, “[w]hether information is a ‘public record’ is not determined by where, how, or on what device that record was created; rather, the question is whether that record was prepared by or used by one or more members of a public body in conducting the affairs of government.”⁵⁷ Second, the attorney general also found that a categorical exclusion for text messages would be inconsistent with the legislative intent of the state FOIA, which includes a general provision that the public should have “full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity.”⁵⁸ The local officials at the heart of the dispute subsequently challenged the attorney general’s opinion in court, leading to a judicial ruling confirming that the Illinois FOIA could

apply to text messages sent or received on personal devices, provided that the messages were received by a quorum of the public body in question, or were sent during a meeting.⁵⁹

In some states, where official opinions have been issued on the subject of emails, the same reasoning has later been applied to text messages. For example, in a 2010 opinion letter to the secretary of state, Florida's office of the attorney general stated, "The Department of State currently maintains administrative rules defining the retention schedule for government agency email. . . . The same rules that apply to email should be considered for electronic communication including Blackberry PINs, SMS communications (text messaging), MMS communications (multi-media content), and instant messaging conducted by government agencies."⁶⁰

Other state attorneys general have addressed the question in less formal documents. The Idaho attorney general appears to have followed an informal policy of including text messages in its working definition of public records since at least 2011, and in 2016 issued a manual advising that "E-mail and texts are considered public records and are subject to the same laws as any other public record."⁶¹ The North Dakota attorney general explained in a 2011 fact sheet that, under state sunshine laws, "'Record' includes all recorded information regardless of physical form (e.g. paper, e-mail, computer file, photograph, audiotape or recording, video, text message, etc.) that has a connection with how public funds are spent or with the public entity's performance of its governmental functions."⁶² In 2015, the Ohio Attorney General issued a post-er-style memo with similar guidance.⁶³

Other State Agency Guidance

Other state agencies and officials have also weighed in with public statements recognizing that text messages are subject to state open-records laws. In 2015, the Washington State Secretary of State issued a public paper finding that text messages, including those sent or received on personal devices, are public records within the meaning of the state open-records law if the text

message relates to agency work.⁶⁴ The Vermont State Archives & Records Administration, which is part of the Secretary of State's Office, advised in a 2013 newsletter that text messages sent or received on officials' personal devices are "absolutely" public records if used to conduct official business.⁶⁵ In guidelines maintained by the State Archives of North Carolina, text messages and instant messages are considered potentially public records, even if sent and received on personal devices.⁶⁶

State ethics organizations, public access boards, and archival departments have issued similar statements, typically as practical guidelines or in response to actual disputes. With mixed results, these statements have sometimes led to attempts to address retention and access issues related to text messages. In 2014, the Mississippi Ethics Commission issued a formal opinion concluding that text messages relating to official business fall within the purview of the Mississippi Public Records Act, noting that "[t]he fact that text messages reside on the mayor's personal cell phone is not determinative as to whether text messages must be produced."⁶⁷ Nevertheless, statewide efforts to address the opinion in official retention guidelines floundered amid controversy, with the state's Department of Archives and History unable to reach a consensus in drafting guidelines for retention of text messages as public records.⁶⁸ Some municipalities developed their own policies to address the requirements articulated by the Ethics Commission.⁶⁹ A number of other state public access boards have also issued statements on the issue, including Maine's Public Access Ombudsman,⁷⁰ Iowa's Public Information Board,⁷¹ the New York Department of State's Committee on Open Government,⁷² and Tennessee's Office of Open Records Counsel.⁷³

In Wisconsin, a policy change issued by the state public records board did not directly address text messages, but was interpreted by the governor's office to justify denying access to text messages, resulting in extensive public discussion of the issue. In 2015, the Wisconsin Public Records board issued a change to its definition of "transitory records"

under state open-records law and policy; soon after the change was issued Governor Scott Walker's office cited the new definition to deny a public-records request to access text messages and governor's mansion visitor logs as transitory records.⁷⁴ The resulting public outcry and a lawsuit filed against the Public Records Board led the board to rescind the new definition of transitory records in early 2016.⁷⁵ The state's Department of Justice also publicly expressed support for an interpretation of the state's open-records law that would include relevant text messages, including those on personal devices.⁷⁶ Even where the public and various branches of government have recognized a right to access these records, resistance to disclose and confusion about new technology complicate practical access.

Recognizing the potential for inadvertent disclosure of sensitive or personal messages, and difficulties complying with relevant laws, some state and local officials have taken steps to attempt to limit the use of text messages to conduct official business. In Maine in 2014, following the issuance of a statement by the state's Public Access Ombudsman that text messages can be public records, Governor Paul LePage's administration implemented a policy to "prohibit texting and the use of personal email" in conducting state business.⁷⁷ In Nebraska, after Omaha mayor Jean Stothert initially denied requests from the *Omaha-World Herald* for text messages, the Nebraska Attorney General's Office issued a disposition letter concluding that "text messages made in the course of public business by governmental officials are public records" subject to disclosure under the state's open-records law.⁷⁸ Shortly thereafter, Mayor Stothert signed an Executive Order clarifying the city's policy regarding the use of text messages. The policy bans sending text messages from personal phones for official business—although, apparently recognizing that, the new policy notwithstanding, officials are likely to continue to conduct business via text, the policy also requires that text messages used for city business be "maintained and produced" in accordance

with Nebraska's Public Records Act.⁷⁹ That officials will increasingly use new technologies to conduct public business seems inevitable.

Access to Text Messages in Practice

In many cases, state and local officials have produced text messages voluntarily, in response to court orders, or pursuant to settlement terms. Still, enforcement challenges are common.

Voluntary Release of Text Messages in Response to Public Records Requests

In a number of cases, state agencies or other public institutions have produced text messages in response to records requests, without the need to compel release through litigation. In 2013, in response to a request from the *Baltimore Sun* requesting "one week's worth of BlackBerry messages sent to or by several members of the Governor's office," the state provided the records, and ultimately inadvertently released some additional text messages as well.⁸⁰ In 2015, the Arizona *Capitol Times* undertook a drawn-out and combative process of requesting text messages from state lawmakers, many of whom at least partially complied.⁸¹ In 2015, a Michigan state judge resigned after text messages between him and a friend were requested and released, exposing the judge as having smoked marijuana and taken part in other activities in violation of the judicial code of conduct, and having inappropriately discussed his cases and city contracts.⁸²

Of course, in many other cases public officials have denied requests for access to text messages, sometimes resulting in confusion, controversy, litigation, or an ultimate failure to access the records. Public officials' responses to requests in Massachusetts have been muddled, with some compliance with requests and some attempts to avoid producing text messages. In August 2015, Boston Mayor Marty Walsh rejected a public records request for text messages, initially citing lack of "technical capacity" to make copies of the text messages,⁸³ but later acknowledging that text messages on his work phone were public records.⁸⁴ A spokesperson for the mayor said that city hall was "exploring a system to retain text

messages."⁸⁵ In December 2015, Nevada Governor Brian Sandoval rejected a public records request for text messages, prompting the company that made the request to sue.⁸⁶ Despite significant public attention to the controversy, the lawsuit was ultimately dropped.⁸⁷ As these cases illustrate, accessing text messages depends not only on a favorable interpretation of the underlying statute, but also on functional government policies that facilitate compliance.

Judicial Texts: Litigation to Compel Access to Text Messages

As is evident from several examples discussed above, in many states, public officials' denials of access to relevant text messages have been challenged in court. In the majority of these cases, state and federal courts have interpreted state open-records laws to apply to text messages. Obtaining access, even following such a holding, can still be complicated and burdensome. In 2015, the Washington Supreme Court unanimously held "that text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone."⁸⁸ The court reasoned that the Washington Public Records Act, whose broad definition of public records applies to "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics," can apply to messages on personal devices because a government agency acts only through its employees, and the content, rather than the format, of the message should inform whether the message is a public record subject to disclosure.⁸⁹ The court also found persuasive the fact that mobile phones are "indispensable fixture[s]" of modern life, and the wide use of text messaging to communicate. The opinion also noted that "many counties, cities, and agencies around the state recognize the need to capture and retain public records created on personal devices," suggesting a give-and-take between local-level efforts to apply the

statute to new forms of communication, and the importance of a statewide court decision to ensure consistent application across jurisdictions.⁹⁰

Lower courts in other states have also addressed the issue, though practical challenges remain. In Illinois, despite practical implementation challenges, there is now little question that text messages from personal accounts may qualify as public records. As discussed above, an Illinois appeals court in 2013 held that the state FOIA could apply to text messages sent or received on public officials' personal devices, provided the messages or message conversation met the definition of a public record or public meeting.⁹¹ Despite this holding, in 2015 the issue arose again, with a contentious legal battle between Chicago mayor Rahm Emanuel and the *Chicago Tribune* over access to the mayor's emails, texts, and other communications; a Cook County judge concluded in 2015 that the records were not exempt from disclosure under the state's FOIA merely because they were sent using private accounts, and refused to dismiss the case despite the mayor's continued resistance to release all requested messages.⁹² After being ordered by the court to release various emails and text messages, the mayor's office eventually agreed to settle the case in late 2016.⁹³ In 2014, a Louisiana appeals court held that various records, including "records evidencing the telephone calls and text messages referred to in [a letter outlining termination of a government contract]" were public records and did not qualify for an exception to the state Public Records Act.⁹⁴ In a 2015 decision, a panel of appellate judges in Pennsylvania held that that phone messages between township supervisors relating to township business were public records under the state's Right-to-Know law, even though they were sent and received on a supervisor's private phone. The court noted that the law would be rendered virtually meaningless if public officials could simply avoid disclosure obligations by using personal devices.⁹⁵

In 2008—in a relatively early state FOIA case involving text messages—Detroit mayor Kwame Kilpatrick,

resigned in disgrace and pled guilty to ten felonies in a scandal that began with requests by the *Detroit Free Press* to access text messages between the mayor and other public officials.⁹⁶ The ensuing legal battle, which cost the economically beleaguered city and the newspaper hundreds of thousands of dollars, ultimately led to the release of incriminating text messages on city-owned devices, uncovering an affair between Kilpatrick and his chief of staff, as well as corruption and perjury related to improper use of public funds in an attempt to keep the affair secret.⁹⁷

Settlements have also led to the release of text messages. For example, in a 2015 settlement with the American Civil Liberties Union (on behalf of People for the Ethical Treatment of Animals), the city of Norfolk, Virginia, acknowledged that text messages “sent or received in the conduct of public business are ‘public records’ as that term is defined in both [state open-records laws]” and committed to store and make available text messages sent in the course of public business, subjecting messages to the state’s public records act and FOIA.⁹⁸ Under the settlement, the city established a system whereby an employee must forward relevant text messages to her government email account, where the messages can be preserved in accordance with the City’s public records retention schedule.⁹⁹

Enforcement Challenges

Despite the clear legal consensus in favor of interpreting state open-records laws to apply to text messages—and despite the clear basis for these interpretations in the text of the statutes themselves—actual access to text messages in individual disputes remains difficult and complicated. As the cases discussed above demonstrate, there is significant confusion at the state and local level as to what governments need to do to require retention of records and under what circumstances it is appropriate to deny requests. In one recent example, in the spring and summer of 2016, in the small Colorado town of Basalt, a drama played out over text messages pertaining to a tight mayoral election sent between the mayor and the town

clerk. A citizen submitted requests to review hundreds of texts between the two officials, but the officials had deleted the texts from their phones, and their cellular carrier had a policy of deleting text message content within a few days. The city sought a declaratory judgment against the requestor and, in the alternative, a statement that she could be made to pay retrieval fees. Ultimately, the text messages were unobtainable. An investigation by the local prosecutor resulted in no criminal charges against the officials for having deleted the messages, and the prosecutor told the press that whether the law applied to text messages was “unclear,” even though Colorado case law clearly supports such an interpretation.¹⁰⁰ The episode in Basalt illustrates a number of the difficulties in applying public records laws to text messages: users think of and treat text messages as personal and ephemeral; texts can be deleted from phones and often are not stored elsewhere, making retention enforcement difficult; and officials charged with enforcing the laws can be confused regarding the applicability to texts.

State courts and public officials have also faced challenges weighing privacy interests against open-government requirements and principles. In 2005, the Supreme Court of Colorado held that text messages are, like emails, subject to the requirements of the Colorado Open Record Act—but limited actual disclosure to protect privacy interests.¹⁰¹ The court held that personal emails of a sexual nature between public officials, which were stored on county servers, were not public records.¹⁰² Apparently recognizing a potential for embarrassment, public officials in a number of states other cases have been reluctant to pass legislation that would clarify open-records laws’ applicability to text messages, as in South Dakota.¹⁰³ As discussed above, Utah legislators went so far as to explicitly exempt text messages from the state open-meetings law, although the resulting public outcry led to their repealing the amendment and reverting to the previous version of the statute, which is silent as to text messages.

Even where the applicability of state

law to text messages is clear, the temporary, extemporaneous quality of text messages presents challenges of compliance with open-records laws, particularly to retention and preservation requirements. Over the past year, the Montana press has paid increasing attention to the issue of the use of personal email, text messages, and social media messaging for official business, and the failure of public officials to properly retain these documents pursuant to state law.¹⁰⁴ Montana’s statute defines a public record as any public information that is “fixed in any medium,” retrievable in usable form for future reference, and “designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee.”¹⁰⁵ In the context of requests from reporters for emails and text message exchanges involving the governor, the governor’s office produced some personal emails, but production of text messages was more complicated because the state does not catalogue text messages and cellular carriers typically retain the content of text messages for only a few days. As a governor’s office attorney acknowledged to a local newspaper, regarding requests for text messages: “This is new ground. We’ve never seen any of this stuff before.”¹⁰⁶

Other states and localities have grappled with similar retention problems. In a 2016 case, the Connecticut Freedom of Information Commission admonished state officials regarding proper retention, but decided it did not have jurisdiction to actually enforce retention schedules.¹⁰⁷ And in Florida in 2014, Orange County officials agreed to pay \$90,000 to settle a case, dubbed “textgate” in local press, after they were accused of deleting text messages in violation of the state public-records statute.¹⁰⁸ At the heart of the case were text messages sent by county commissioners to lobbyists and others opposed to a ballot measure concerning workers’ right to paid sick leave. Despite the scandal and the unfavorable settlement and penalties, the deleted text messages remained deleted and thus inaccessible.

Even when retention provisions are codified by statute, as in Missouri,¹⁰⁹

there have been significant roadblocks to obtaining records pursuant to the law. In 2014, media outlets including St. Louis Public Radio and the Associated Press submitted requests to the city of Ferguson, Missouri, for text messages and emails from several police officials in relation to the police shooting death of Michael Brown, an unarmed black teenager. The city of Ferguson responded to the reporters, stating that fulfilling the request would cost the requestors more than \$2,000 in research, analysis, redacting, and copying fees—even though Missouri’s Sunshine Law provides that copying fees shall not exceed 10 cents a page and hourly fees for clerical costs shall not exceed average hourly wages for government clerical staff.¹¹⁰ Ultimately, the city released a number of the requested emails, although the text messages were never released.¹¹¹

Lack of clarity also surrounds the applicability of open-records laws to text messages that a state or local government does not “possess” because the messages are stored on personal devices. Significant enforcement difficulties have arisen in some cases where the state or even courts find that the state is only responsible for providing access to text messages that are in state possession – rendering any interpretation of the statute as applicable to text messages largely meaningless, since so many text messages are typically sent on officials’ personal devices. In Kentucky in 2015, despite a broad statutory definition that applies to all documents “regardless of physical form or characteristics,”¹¹² the state attorney general issued an opinion concluding that communications, including text messages, stored on a private device are not in the “possession” of the public agency and are therefore not subject to disclosure.¹¹³ These challenges, among others, highlight the difficulty of enforcing existing laws to new technologies, even when the legal basis for applying the law is clear.

Conclusion: Broader Implications of the Ever-Expanding Web of Digital Communication

While state laws and policies have yet to catch up with text messages,

technology marches forward. With increasing frequency, messaging apps are used in the workplace. Notably, the messaging platform Slack is promoted as an office-friendly platform “where work happens.” It is reportedly used by employees at a number of federal agencies including NASA, the GSA, and the State Department,¹¹⁴ and a Slack spokesperson told reporters in 2016 that the platform builds in “extra export capabilities” to allow federal agencies to comply with FOIA requests.¹¹⁵ Despite the theoretical ability to properly export and retain Slack messages, it appears that obtaining Slack messages through FOIA requests may prove as difficult as compelling release of text messages has been in the states: when MuckRock, a website that sends and monitors FOIA requests, submitted a request to the FCC asking for a list of teams that use Slack at work, the FCC returned a “No Responsive Documents Response.”¹¹⁶

Undergirding the discussion of text messages and other relatively informal electronic communications as public records is the suspicion, in some cases, that these communication formats are not used accidentally, but in fact in a purposeful effort to avoid state open-records laws. If states and local governments do manage to formalize retention of text messages to comply with relevant statutes, the next hurdle may be reaching messages sent using apps that, by design, permanently delete data shortly after it is sent and received. In 2016, the app Telegram, which allows users to set their messages to self-destruct after a short period of time, reportedly became popular among high-ranking San Francisco government officials, including city legislators. City staffers were quoted anonymously in reports stating that the purpose of using the app was to avoid having to produce the communications pursuant to public records laws; a city supervisor confirmed to reporters that officials were using the app, but denied they were doing so to evade public records requests.¹¹⁷ There have been recent reports of Trump Administration staffers using Confide, a chat app that erases messages as soon as they are read. Reported reasons ranged from anxiety

about the vulnerability of electronic communications to hacking and/or investigations, to staffers’ desire to secretly leak information to the media.¹¹⁸

As officials increasingly use text messaging and other technologies to conduct public business, retention and production of public records will continue to draw public attention and pressure. In most states, a statutory right to access public records in any form clearly applies to text messages and other new technologies, even when they are not facially contemplated by the statutory language. Yet, as the experience in the states demonstrates, this statutory right faces ongoing resistance and confusion. Public officials will need to grapple with court decisions favoring access, retention and preservation of these records, and concerns about privacy as they continue to use texts and other new technologies to conduct public business.

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6. See Letter from Avi S. Garbow, General Counsel, U.S. Environmental Protection Agency, to Lamar Smith,

Chairman, Committee on Science, Space and Technology, U.S. House of Representatives (Apr. 23, 2015), https://www.epa.gov/sites/production/files/2015-04/documents/letter_to_chairman_lamar_smith.pdf.

7. Bulletin 2015-02, U.S. National Archives & Record Administration (July 29, 2015), <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html>. The NARA bulletin construes the scope of FOIA as applying broadly to any messages related to agency business, and to any federal employee, contractor, volunteer, or “external expert[]”: “Employees create Federal records when they conduct agency business using personal electronic messaging accounts or devices. This is the case whether or not agencies allow employees to use personal accounts or devices to conduct agency business. *Id.*”

8. *See* E-Mail Management, Department of Homeland Security Records Management, <https://www.archives.gov/files/records-mgmt/toolkit/pdf/ID317.pdf>.

9. *See, e.g.*, Office of Inspector General, U.S. Department of State, Broadcasting Board of Governors, ESP-16-01: Evaluation of the Department of State’s FOIA Processes for Requests Involving the Office of the Secretary (Jan. 2016), <https://oig.state.gov/system/files/esp-16-01.pdf> (“FOIA neither authorizes nor requires agencies to search for Federal records in personal email accounts maintained on private servers or through commercial providers (for example, Gmail, Yahoo, and Hotmail). . . . Records subject to FOIA are those that are (1) either created or obtained by an agency and (2) under agency control at the time of the FOIA request.”) (internal citations omitted).

10. For purposes of this article, I use the terms “text message” and “text” broadly to apply to any electronic message (SMS, MMS, etc.) sent using a mobile phone or other device, and sent over a cellular, wireless, or other network.

11. Texas Public Information Act, Tex. Gov’t Code Ann. § 552.002(c) (2015), <http://www.statutes.legis.state.tx.us/SOTWDocs/GV/hm/GV.552>.

[htm](#) (emphasis added); *see also* Texas Attorney General’s Public Information Handbook 2016, https://www.texas-attorneygeneral.gov/files/og/publicinfo_hb.pdf. Amended by Acts 2013, 83rd Leg., R.S., Ch. 1204 (S.B. 1368), Sec. 1, eff. September 1, 2013, <http://www.legis.state.tx.us/tlodocs/83R/billtext/html/SB01368F.HTM> (adding “e-mail, Internet posting, text message, instant message, other electronic communication” to section 552.002(c), among other amendments). Emphasis added

12. *See* Letter from Greg Abbott, Attorney General of Texas, to Jaime J. Munoz, Esq. (Sept. 14, 2011), <https://texasattorneygeneral.gov/opinions/openrecords/50abbott/orl/2011/html/or201113256.htm>.

13. *Id.*

14. The experience in Texas also highlights this issue’s potential for bipartisan appeal; both Republicans and Democrats have in different situations advocated strongly in favor of access—and been the subjects of records requests.

15. Ga. Code Ann. § 50-18-71(g) (2017) (emphasis added). The statute defines public records to include all “documents, . . . letters, . . . computer based or generated information, data, data fields, or similar material prepared and maintained or received by an agency or by a private person or entity in the performance of a service or function for or on behalf of an agency or when such documents have been transferred to a private person or entity by an agency for storage or future governmental use.” *Id.* § 50-18-70(b)(2). All records not exempted by statute or court order “shall be open for personal inspection and copying.” *Id.* § 50-18-71(a); Sam Olens, Attorney General, Georgia’s Sunshine Laws: A Citizen’s Guide to Open Government 2 (5th ed. 2014), http://law.ga.gov/sites/law.ga.gov/files/related_files/site_page/GeorgiaSunshineLaws2014WebEdition.pdf. (emphasis added)

16. N.M. Admin. Code §§ 1.13.4.7(D), 1.13.4.9 (emphasis added). The New Mexico Inspection of Public Records Act defines public records broadly to include “all documents, papers, letters, books, maps, tapes, photo-

graphs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.” N.M. Stat. Ann. § 14-2-6(G). Emphasis added

17. Kan. Stat. Ann. § 45-217(g); 2016 Kan. Laws Ch. 82 (S.B. 22).

18. *Kansas Open Records Act (KORA) Update, Effective 7/1/2016*, University of Kansas Office of Public Affairs, <https://publicaffairs.ku.edu/kansas-open-records-act-kora-update-effective-7-1-2016>.

19. *See* Bill History, House Bill 1153, South Dakota Legislature, Legislative Research Council, http://sdlegislature.gov/legislative_session/bills/Bill.aspx?Bill=1153&Session=2015 (confirmed in a Feb. 23, 2017, call to Legislative Research Council that the committee voted to defer the bill to the 41st legislative day—that is, that the bill would not be discussed during the legislature’s 40-day session).

20. Daily Republic Editorial Board, *Our View: Time to Expand Open-Meeting, Public Records with HB 1153*, Daily Republic (Feb. 26, 2015), <http://www.mitchellrepublic.com/opinion/editorials/3688283-our-view-time-expand-open-meeting-public-records-hb-1153>.

21. H.B. 477, General Sess. (2011), <http://le.utah.gov/~2011/bills/static/HB0477.html>.

22. H.B. 1001, 1st Spec. Sess. (2011) (Repeal of Utah H.B. 477), <http://le.utah.gov/~2011s1/bills/static/HB1001.html>.

23. *See, e.g.*, Lisa Riley Roche, *GRAMA Group Makes Recommendations; Can’t Agree on Text Messages*, KSL.com (June 22, 2011), <https://www.ksl.com/?sid=16080812/> (describing the history and repeal of H.B. 477 and quoting several Utah legislators regarding their opinions on the inclusion of text messages in public records subject to the Government Records Access and Management Act).

24. Utah Code Ann. § 63G-2-103 (2016), https://le.utah.gov/xcode/Title63G/Chapter2/C63G-2_1800010118000101.pdf.

25. 5 Ill. Comp. Stat. § 140/2(c) (2016).

26. Colo. Rev. Stat. § 24-72-202(6) (a)(I), (7), (1.2).

27. For example, under Arizona law, public records are defined broadly and include documents “produced or reproduced on film or electronic media.” Ariz. Rev. Stat. Ann. § 41-151.18 (2016). Other state statutes that explicitly pertain to electronic records or communications include the New Jersey Open Public Records Act (defining “government record” to include “information stored or maintained electronically”), N.J. Stat. Ann. § 47:1A-1.1 (2017), the Arkansas Freedom of Information Act (defining public records to include “electronic or computer-based information”), Ark. Code Ann. § 25-19-103(5)(A) (2017), Hawaii’s open-records law (defining public records broadly, and including electronic formats), Haw. Rev. Stat. § 92F-3 (2016), the Indiana Access to Public Records Act (defining public record as any material that is “created, received, retained, or filed by or with a public agency,” including electronically stored data), Ind. Code § 5-14-3-2(r) (2016), and the Maine Freedom of Access Act (defining “public records” to include “any written, printed or graphic matter or any mechanical or electronic data compilation. . . .”), Me. Stat. tit. 1, § 402(3) (2017).

28. Va. Code Ann. § 2.2-3701 (2016) (emphasis added), <http://law.lis.virginia.gov/vacode/2.2-3701/>. Emphasis added

29. Alaska Stat. § 40.21.150(6) (2016).

30. La. Stat. Ann. § 44:1(A)(2)(a) (2016).

31. Md. Code Ann. § 4-101(j) (2016).

32. N.H. Rev. Stat. Ann. § 91-A:1-a(III) (2016).

33. Ohio Rev. Code Ann. § 149.011(G) (2016), <http://codes.ohio.gov/orc/149.011>.

34. 38 R.I. Gen Laws § 38-2-2 (2016), <http://webserver.rilin.state.ri.us/Statutes/title38/38-2/38-2-2.HTM>.

35. Tenn. Code Ann. § 10-7-501 through 515, § 10-7-505(d) (2016) <http://www.comptroller.tn.gov/openrecords/pdf/20140210TennesseeOpenRecordsAct.pdf>.

36. Mass. Gen. Laws ch. 4, § 7, cl. 26

(2017) (emphasis added). The Massachusetts statute is notably restrictive, however, in that it does not apply to several categories of officials, including legislators and judges. Emphasis added

37. Conn. Gen. Stat. § 1-200(5) (2016).

38. Miss. Code Ann. § 25-61-3(b) (2017).

39. Idaho Code § 74-101(13) (2017).

40. Iowa Code §§ 22.2(1), 22.1(3) (2016) (“[P]ublic records’ includes all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to” the state, a locality, or any political subdivision of either.”).

41. Ky. Rev. Stat. Ann. § 61.870(2) (2017) (applying to all documents “regardless of physical form or characteristics”).

42. Neb. Rev. Stat. § 84-712.01(1) (2016) (“[P]ublic records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.”).

43. New York Freedom of Information Law, N.Y. Pub. Off. Law § 86 (McKinney 2017) (applying to records “in any physical form whatsoever”). In the 2015-16 session, the New York State Assembly considered a bill to “establish procedures for retention of and access to state electronic records.” N.Y. State Assembly Mem. in Supp. of Legislation, AB 6078, (2015), http://assembly.state.ny.us/leg/?default_fld=%0D%0A&leg_video=&bn=AB+6078&term=2015&Summary=Y&Actions=Y&Memo=Y&Text=Y. The bill was not enacted. ABC News reported in 2008 that state lawmakers in New York were working on revising the open-records law to specifically add text messages, though that effort apparently did not culminate in such a revision. Ledyard King & Gannett News Service, *Text Messages Enter Public-Records Debate*, ABC News (<http://abcnews.go.com/Technology/story?id=4457702&page=1>).

44. N.C. Gen. Stat. § 132-1(a) (2016)

(including documents “regardless of physical form or characteristics”).

45. Michigan Freedom of Information Act, Mich. Comp. Laws § 15.232(e) (2016) (“‘Public record’ means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.”).

46. Oklahoma Open Records Act, Okla. Stat. tit. 51, § 24A.1-29 (2016), <http://www.odl.state.ok.us/lawinfo/docs/2006-librarylaws-part2.pdf> (“Record” means all documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, desk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.”).

47. Or. Rev. Stat. § 192.410(4)(a) (2016) (“Public record includes any writing that contains information relating to the conduct of the public business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.”).

48. Pennsylvania Right-to-Know Law, 65 Pa. Cons. Stat. § 67.102 (2016), <http://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=2008&sessInd=0&smthL-wInd=0&act=3&chpt=1&sctn=2&-subsctn=0> (defining “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.”).

49. South Carolina Freedom of

Information Act, S.C. Code Ann. § 30-4-15 (2016) (“Public record” includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.”), <http://www.scstatehouse.gov/code/t30c004.php>.

50. Vt. Stat. Ann. Tit. 1, § 317(b) (2016) (“As used in this subchapter, “public record” or “public document” means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business.”), <http://legislature.vermont.gov/statutes/section/01/005/00317>.

51. Wash. Rev. Code § 42.56.010(3) (““Public record” includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”).

52. Del. Code Ann. Tit. 29, § 10003(i)–(j) (2016). However, the Delaware law expressly exempts emails sent by Delaware General Assembly representatives or their staff.

53. Mo. Rev. Stat. § 610.025 (2016).

54. *See, e.g.*, Mass. Gen. Laws ch. 4, § 7, cl. 26 (2017).

55. *See, e.g.*, Ky. Rev. Stat. Ann. § 61.870(2); North Dakota. In North Dakota, ““Record” means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.” N.D. Cent. Code § 44-04-17.1 (2017).

56. Pub. Access Op., Op. III. Att’y Gen. 11-006 (2011), <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-006.pdf>.

57. *Id.* at 5.

58. *Id.* In a 2009 opinion, the Oklahoma Attorney General reached a similar conclusion for similar reasons. Op. Okla. Att’y Gen. 09-12 (2009), <https://>

casetext.com/case/opinion-no-10775; *see also* Rachel Lawrence-More et al., *Public Records in Oklahoma* (2014), [https://www.oag.ok.gov/oagweb.nsf/0/c278f660e5918490862572b400738e38/\\$FILE/Open%20Records.pdf](https://www.oag.ok.gov/oagweb.nsf/0/c278f660e5918490862572b400738e38/$FILE/Open%20Records.pdf).

59. *City of Champaign v. Madigan*, 992 N.E.2d 629, 640 (Ill. App. Ct. 2013). The court disagreed with the attorney general’s reasoning on certain aspects of the law’s applicability; for example, the court held that certain text-message communications between an official and a constituent may not be subject to disclosure.

60. *Records, Retention of Electronic Communications*, Informal Advisory Legal Op., Op. Fla. Att’y Gen., Mar. 17, 2010, http://myfloridalegal.com/__85256236006EB5E1.nsf/0/D0EBF6340A256875852578950052FE0A?Open&Highlight=0,retention,of,electronic. A 2008 opinion by the Arkansas attorney general grouped text messages with voice messages and emails in considering whether certain records’ release had been appropriate, and found that all these formats could constitute public records, although the opinion concluded that, regarding the particular text messages at issue, “the privacy interest in this instance probably rises to a level sufficient to overcome the public’s interest in the release of this particular record.” Op. Ark. Att’y Gen. 2008-096 at 12-13 (2008), <http://www.arkansasag.gov/assets/opinions/2008-096.html>.

61. Idaho Att’y Gen. Lawrence Wasden, Idaho Public Records Law Manual 5–6, Office of the Att’y Gen. (July 2016), <http://www.ag.idaho.gov/publications/legalManuals/PublicRecordsLaw.pdf>; Dustin Hurst, *As Other States Struggle with Text Messages as Public Records, Idaho is Clear—Sort Of*, Idaho Reporter (June 30, 2011), <http://idahoreporter.com/16698/as-other-states-struggle-with-text-messages-as-public-records-idaho-is-clear-sort-of/>.

62. A Citizen’s Guide to North Dakota’s Open Meetings and Open Records Laws 1, Office of Attorney General (2011), <http://library.nd.gov/statedocs/AttorneyGeneral/OR&MeetingsCitizens0820120416.pdf>.

63. What You Need to Know About the Ohio Attorney General’s Public

Records Policy (undated; URL suggests publication in 2015), <http://www.ohio-attorneygeneral.gov/Files/About/Public-Records-Access/Public-Record-Poster-%28updated-03-12-15%29.aspx> (“Electronic records are to be treated in the same fashion as records in other formats. Communications, such as text messages, instant messages, and e-mails may be public records if their content documents the business of the Office of the Ohio Attorney General.”).

64. Office of the Sec. of State, Wash. State Archives, *Electronic Records Management: Are Text Messages Public Records?* (Apr. 2015), <http://www.sos.wa.gov/assets/archives/RecordsManagement/Advice-Sheet-Are-Text-Messages-Public-Records-April-2015.pdf>. Months later, the state supreme court would hold the same. *See infra* note 92 and accompanying text.

65. Vt. State Archives & Records Admin., Sec. of State’s Office, Quarterly Newsletter (Winter 2013-2014), https://www.sec.state.vt.us/media/224861/rim_update_winter2013-14.pdf.

66. N.C. Dep’t of Cultural Res., *Best Practices for Electronic Communications Usage in North Carolina: Text and Instant Message* (Mar. 2012), http://archives.ncdcr.gov/Portals/3/PDF/guidelines/Text_Messaging_Document.pdf; *see also* State Archives of N.C., Digital Records Policies and Guidelines, <http://archives.ncdcr.gov/For-Government/Digital-Records/Digital-Records-Policies-and-Guidelines> (last visited Mar. 2, 2017) (“Both personal and workplace-issued devices, when used by employees to conduct public business, result in communications that constitute public records . . .”).

67. Miss. Ethics Comm’n, Pub. Records Op. No. R-13-023 (Apr. 11, 2014), [http://www.ethics.state.ms.us/ethics/ethics.nsf/PageSection/A_records_R-13-023/\\$FILE/R-13-023.pdf?OpenElement](http://www.ethics.state.ms.us/ethics/ethics.nsf/PageSection/A_records_R-13-023/$FILE/R-13-023.pdf?OpenElement).

68. *See* Robbie Ward, *Archives Department Backs Off Text Message Guidelines*, Daily Journal (Apr. 22, 2015), <http://djournal.com/news/archives-department-backs-off-text-message-guidelines/>.

69. For example, the city of Tu-

pelo amended its open-records policy to establish a means of retaining text messages, requiring that text messages must be forwarded to an archive via email daily “or in real time.” <http://www.tupeloms.gov/wp-content/uploads/2015/01/MIN20141021.pdf> (“In the matter of review/approve resolution amending open-records policy, electronic message policy, record retention policy, and amending provisions of employee handbook” was unanimously approved); <http://djournal.com/news/tupelo-leader-e-message-policy/>. Municipal Minutes, City of Tulepo, State of Miss. (Oct. 21, 2014), <http://www.tupeloms.gov/wp-content/uploads/2015/01/MIN20141021.pdf> (“In the matter of review/approve resolution amending open-records policy, electronic message policy, record retention policy, and amending provisions of employee handbook” was unanimously approved); Robbie Ward, *Tupelo Could Be Leader on E-Message Policy*, Daily Journal (Sept. 10, 2014), <http://djournal.com/news/tupelo-leader-e-message-policy>.

70. Maine’s Public Access Ombudsman told a legislative panel in 2014 that text messages can be public records: “If a text message is received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business and is not deemed confidential or excepted from the FOIA, it is a public record.” See Steve Mistler, *Are Maine Officials Using a Secret Message System?*, Portland Press Herald, Mar. 14, 2014, <http://www.pressherald.com/2014/03/14/are-maine-officials-using-a-secret-message-system/>.

71. See Keith Lucht et al., *IPIB Powers, Duties and Hot Topics*, Iowa Pub. Info. Bd. (Oct. 10, 2014), <https://ipib.iowa.gov/documents/ipib-powers-duties-and-hot-topics-0> (concluding that text messages are public records).

72. N.Y. Dep’t of State, Com. on Open Gov’t, Nov. 2012 – Reasonableness (2012), <http://www.dos.ny.gov/coog/reasonableness.html> (“With respect to text messages, we surmise that to the extent that a text message continues to exist and can be recovered with

reasonable effort, it would constitute a ‘record’ subject to disclosure based on content.”).

73. State of Tenn., Comptroller of the Treasury, Op. Letter (May 16, 2011), <https://www.comptroller.tn.gov/openrecords/pdf/11-3CityOfMemphisTextMessages.pdf>. (“[A]ny text message made or received on the City owned cellular phones that relate to City business are public records that are accessible to the public unless there is a provision that makes the entire text message or a portion of the content of the text message confidential.”). The statement does not address how text messages on a Tennessee official’s *personal* device would be treated.

74. Wis. Pub. Records Bd., Admin. and Related Records (Aug. 23, 2010), <http://publicrecordsboard.wi.gov/docview.asp?docid=15863&locid=165>; Greg Neumann, *Update: Public Records Board Unanimously Votes to Rescind Transitory Records Changes*, WKOW.com (Jan. 26, 2016), <http://www.wkow.com/story/30935723/2016/01/11/public-records-board-to-vote-on-whether-text-messages-should-be-archived>; Bryna Godar, *Public Records Board Scraps Transitory Record Changes*, Wash. Times (Jan. 11, 2016), <http://www.washingtontimes.com/news/2016/jan/11/public-records-board-scraps-transitory-record-chan/>.

75. Katelyn Ferral, *Wisconsin’s Public Records Board Scraps Transitory Records Changes*, Capital Times (Jan. 11, 2016), http://host.madison.com/ct/news/local/wisconsin-s-public-records-board-scraps-transitory-records-changes/article_11c707c8-78a7-5a15-bd32-c9c-c9a4ec63f.html.

76. Mary Spicuzza & Jason Stein, *State Battle on Electronic Records Is Latest in National Trend*, Journal Sentinel (Dec. 11, 2015), <http://archive.jsonline.com/news/statepolitics/scott-walker-says-there-may-be-changes-to-how-records-board-operates-b99632665z1-361599421.html>.

77. Steve Mistler, *Texting Banned for Maine State Business*, Portland Press Herald (Mar. 28, 2014), http://www.pressherald.com/2014/03/28/lepage_administration__no_more_texting_to_

[conduct_public_business/](http://www.pressherald.com/2014/03/28/lepage_administration__no_more_texting_to_conduct_public_business/).

78. Letter from Leslie S. Donley, Assistant Att’y Gen., to Michael C. Cox, Esq., at 14 (May 14, 2015), <https://ago.nebraska.gov/sites/ago.nebraska.gov/files/doc/15-R-118.pdf>.

79. Jean Stothert, Mayor, City of Omaha, Exec. Order No. S-28-15, http://hr.cityofomaha.org/images/stories/public_documents/executive_orders/S-28-15%20Preferred%20Communications%20for%20Official%20City%20Business.pdf.

80. Scott Calvert, *Accidentally Released Text Messages Give Peek at O’Malley Discussions*, Balt. Sun (Apr. 4, 2013), http://articles.baltimoresun.com/2013-04-04/news/bs-md-sun-investigates-0331-20130330_1_text-messages-rick-abbruzzese-o-malley.

81. See Rachel Leingang & Hank Stephenson, *Stonewalled: Legislature Redacts, Delays, and Denies Access to Messages*, Ariz. Capitol Times (Nov. 19, 2015), <http://azcapitoltimes.com/news/2015/11/19/stonewalled-legislature-redacts-delays-and-denies-access-to-social-media-messages/>.

82. John Counts, *Read All the ‘Deeply Offensive’ Text Messages That Prompted Ann Arbor Judge to Resign*, Mich. Live (Aug. 17, 2015), http://www.mlive.com/news/ann-arbor/index.ssf/2015/08/read_all_the_deeply_offensive.html.

83. Andrew Ryan, *Text Messages Off Limits, Walsh Says*, Bos. Globe (Aug. 9, 2015), <https://www.bostonglobe.com/metro/2015/08/09/mayor-walsh-denies-records-request-for-text-messages-exchanged-during-olympic-bid/z4pExclyaqkFn-1LOOp2QK/story.html>.

84. Kyle Scott Clauss, *Mayor Marty Walsh Deleted His Text Messages, Potentially Broke the Law*, Bos. Magazine (Jan. 8, 2016), <http://www.bostonmagazine.com/news/blog/2016/01/08/marty-walsh-text-messages/>.

85. *Id.* In a separate dispute, the Massachusetts Governor’s office rejected a request for text messages, arguing that the governor’s office was exempt from Massachusetts’s public records law—but not that texts were categorically exempt. See Todd Wallack, *Governor Baker Rejects Requests for Texts*, Bos.

Globe (Sept. 19, 2015), <http://www.bostonglobe.com/metro/2015/09/18/governor-baker-won-give-his-text-messages/gtDeYaPwEToGNjYMPHhpMM/story.html>.

86. Scott Lucas, *Sandoval's Text Messages to NV Energy Should Be Made Public, Experts Say*, Las Vegas Sun (Dec. 10, 2015), <http://lasvegassun.com/news/2015/dec/10/sandoval-text-messages-to-nv-energy-should-be-made/>.

87. *Rooftop Solar Company Drops Suit Against Governor Sandoval*, Kolo (May 24, 2016), <http://www.kolotv.com/content/news/Rooftop-solar-company-drops-suit-against-Governor-Sandoval-380725051.html>; Michelle Rindels, *Rooftop Solar Company Sunrun Drops Suit Against Governor*, Wash. Times (May 24, 2016), <http://www.washingtontimes.com/news/2016/may/24/rooftop-solar-company-sunrun-drops-suit-against-sa/>.

88. *Nissen v. Pierce Cty.*, 357 P.3d 45, 55 (Wash. 2015), <https://www.courts.wa.gov/opinions/pdf/908753.pdf>; see also Martha Bellisle, *Court: Texts on public employee's cellphone are public records*, Seattle Times (Aug. 28, 2015), <http://www.seattletimes.com/seattle-news/court-texts-on-public-employees-cell-phone-public-records/>.

89. *Nissen*, 357 P.3d 45.

90. *Nissen*, 357 P.3d 45. Indeed, in the months before the state supreme court decision, localities had begun to address personal messaging in retention policies. For example, Bonney Lake, a town outside Seattle, had begun using an archiving platform called Smarsh for text message archiving of government employees. Michael Grass, *Yes, That Text Message Is a Public Record*, Gov. Exec. (Jan. 5, 2015), <http://www.govexec.com/state-local/2015/01/text-message-archiving-smarsh/102204/>; Smarsh, <http://www.smarsh.com/> (last visited Mar. 3, 2017).

91. *City of Champaign*, 992 N.E.2d at 640.

92. Patrick M. O'Connell, *Judge Rejects Emanuel Assertion That Emails Are Exempt from Disclosure*, Chi. Tribune (May 31, 2016), <http://www.chicagotribune.com/news/local/politics/ct-tribune-emanuel-email-lawsuit-met->

[20160531-story.html](http://www.chicagotribune.com/news/local/politics/ct-tribune-emanuel-email-lawsuit-met-20160531-story.html); see also *Chicago Tribune Co. v. City of Chicago Office of the Mayor*, 2015-CH-14058 (Sept. 24, 2015).

93. Bill Ruthhart, Hal Dardick & Jeff Coen, Emanuel Admits Using Personal Email for Public Business as City Settles Open Records Lawsuit, L.A. Times (Dec. 22, 2016), <http://www.latimes.com/ct-rahm-emanuel-personal-emails-met-20161221-story.html>.

94. *McKay v. State, Div. of Admin.*, 143 So. 3d 510 (La. Ct. App. 2014); see also statement of Public Affairs Research Council of Louisiana (Apr. 23, 2015), <http://parlouisiana.org/wp-content/uploads/2016/03/Louisiana-needs-a-champion-for-open-government.pdf> (calling on Louisiana's government to be more transparent by, among other things, suggesting that the attorney general to set standards for "agencies and public officials to follow regarding emails, government use of personal email accounts, text messages, twitter, Facebook, and other new forms of communication").

95. See *Paint Township v. Clark* 109 A.3d 796 (Pa. Commw. Ct. 2015); see also Text Messages on Private Cell Phones are Likely Subject to Right to Know Requests, <http://www.sweetsteven.com/newsroom/text-messages-on-private-cell-phones-are-likely-subject-to-right-to-know-re> (summarizing the case). Although in this case the supervisor received a reimbursement stipend for his cellphone service, the court did not find this to be a deciding factor in the decision. There is, unsurprisingly, also extensive state law regarding the applicability of open-records statutes to emails, with judges generally concluding that emails can be subject to disclosure. See, e.g., *Tennessee Valley Printing Co., Inc. v. Health Care Auth. of Lauderdale Cnty.*, 61 So.3d 1027 (Ala. 2010) (holding that a broad statute can apply to emails).

96. Susan Saulny, *Detroit Mayor Pleads Guilty and Resigns*, N.Y. Times (Sept. 4, 2008), <http://www.nytimes.com/2008/09/05/us/05kwame.html?em>.

97. *Id.*; see also Laura Danielson, *Giving Teeth To The Watchdog: Optimizing Open Records Appeals Processes To*

Facilitate The Media's Use Of Foia Laws, 2012 MICH. ST. L. REV. 981 (2012), <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1048&context=lr>; Smokey Fontaine, Kwame Kilpatrick's Scandalous Text Messages Revealed, News One, <https://newsone.com/128681/kwame-kilpatrick-scandalous-text-messages-revealed/> (last visited Mar. 3, 2017).

98. Consent Decree, *People for the Ethical Treatment of Animals, Inc. v. City of Norfolk*, No. CL 14-75 (Va. Cir. Ct. 2015)

99. Dan Joseph, *City Officials Must Begin Storing Text Messages, Making Them Available to Public*, MRCTV (Jan. 9, 2015, 12:30 PM), <http://www.mrctv.org/blog/city-officials-must-make-text-messages-available-public>

100. See Scott Condon, DA: No Criminal Charges Against Basalt Mayor, Clerk in Text Case, Aspen Times (July 29, 2016), <http://www.aspentimes.com/news/da-no-criminal-charges-against-basalt-mayor-clerk-in-text-case/>; *Denver Pub. Co. v. Bd. of Cnty. Comm'rs of Cnt. Of Arapaho*, 121 P.3d 190, 192 n.1 (Colo. 2005) (en banc) (noting that text messages should be treated as equivalent to emails under CORA).

101. *Denver Pub. Co. v. Bd. of Cnty. Comm'rs of Cnt. Of Arapaho*, 121 P.3d 190 (Colo. 2005) (relying on *Wick Comms. Co. v. Montrose Cnty. Bd. of Cnty. Comm'rs*, 81 P.3d 360, 364 (Colo. 2003) (en banc) ("CORA was not intended to cover information held by a government official in his private capacity.")).

102. 121 P.3d at 203.

103. See *supra* notes 19 and 20 and accompanying text.

104. See, e.g., Jayme Fraser, *Montana Leaders Often Use Personal Email to Conduct Government Business*, The Missoulian (Jan. 8, 2017), http://missoulian.com/news/state-and-regional/montana-legislature/montana-leaders-often-use-personal-email-to-conduct-government-business/article_51bc7f3-6441-5737-935c-7e165e281c08.html ("Montana has no plan to retain emails from personal accounts even if they contain discussions of state business. State policy also does not require employees or elected leaders to

use government accounts exclusively. Similarly, other forms of personal electronic communication – such as texting and social media messaging – are not retained even though many elected leaders say they use the tools on the job.”); Jayme Fraser, *Montana Fails to Retain Decades of Emails Despite Open Government Law*, *The Missoulian* (Jan. 2, 2017), http://missoulian.com/news/government-and-politics/montana-fails-to-retain-decades-of-emails-despite-open-government/article_c6b16a66-4c62-5090-872c-98435614cc77.html (“Email is only part of Montana’s ongoing struggle to preserve electronic files as public records. State officials still must develop or update strategies for other formats, such as text messages, social media posts, digital maps and data collected by license-plate readers.”).

105. Mont. Code Ann. § 2-6-1002(13).

106. Holly Michels, *Increase in Records Requests Slows Response Time, Gov. Bullock’s Office Says*, *The Missoulian* (Mar. 24, 2016), http://missoulian.com/news/state-and-regional/increase-in-records-requests-slows-response-time-gov-bullock-s/article_8f-94dc6a-abbf-52ad-b83f-d2bc96999853.html. Similar issues have been raised in Alaska, where in 2012 the state supreme court held that private emails were subject to the public records law. *McLeod v. Parnell*, 286 P.3d 509, 511 (Alaska 2012) (“[P]rivate emails regarding state business are no different from any other records—those records preserved or appropriate for preservation under the Records Management Act are “public records” under the Public Records Act.”). Alaska Governor Sean Parnell has commented that he believes the law does not apply to text messages because they are “transitory” in nature, although both the state Archives agency as well as a legislative attorney concluded that text messages are covered by the law. See Yereth Rosen, *Alaska High Court Says Private Emails OK for State Business*, *Reuters* (Oct. 12, 2012), [of Alaska Commissioner General Administrative Records Retention and Disposition Schedule #200.2 \(stating that “\[r\]ecord email . . . may include text and instant messages” and requiring retention of these communications\), \[http://archives.alaska.gov/pdfs/records_management/commissioner_schedule.pdf\]\(http://archives.alaska.gov/pdfs/records_management/commissioner_schedule.pdf\); Becky Bohrer, *Legal Memo: Text Messages Are Public Records in Alaska*, Associated Press \(Sept. 7, 2012\), <http://juneauempire.com/state/2012-09-07/legal-memo-text-messages-are-public-records-alaska>.](http://articles.chicagotribune.com/2012-10-12/news/sns-rt-us-usa-alaska-email-bre89c01p-20121012_1_palin-emails-text-messages-alaska-high-court; State</p></div><div data-bbox=)

107. *McGlamery v. Hartford Pub. Schs.*, No. FIC 2015-443 (Conn. Freedom Info. Comm’n 2016), <http://www.ct.gov/foi/cwp/view.asp?a=4162&Q=577270> (finding that requested text messages were not retrievable because they had been deleted and the Commission did “not have jurisdiction to enforce records retention schedules,” but also “remind[ing] the respondents that text messages pertaining to the conduct of the public’s business are public records that must be preserved in accordance with the applicable records retention schedules.” See also *Wojtas v. Town of Stonington*, No. FIC 2014-309 (Conn. Freedom Info. Comm’n 2015), <http://www.ct.gov/foi/cwp/view.asp?a=4162&Q=564998>; *Burgin v. Town of East Hampton*, No. FIC 2011-704 (Conn. Freedom Info. Comm’n 2012), <http://www.ct.gov/foi/cwp/view.asp?a=4162&Q=508042> (personal messages may be public records if they reveal “an inappropriate mixing of the officer’s professional and private life”).

108. See David Damron, *Orange Leaders Settle ‘Textgate,’ Pay \$90,000*, *Orlando Sentinel* (Jan. 13, 2014), [http://www.miamiherald.com/news/state/florida/article65529447.html](http://articles.orlandosentinel.com/2014-01-13/news/os-textgate-civil-lawsuit-settlement-20140113_1_orange-leaders-former-commissioner-john-martinez-citizens-group; Eliot Kleinberg, Text Messages by Local Officials Muddy Public Records Law, Miami Herald (Mar. 10, 2016), http://www.miamiherald.com/news/state/florida/article65529447.html). See also Gregory T. Stewart & Robert D. Guthrie, *Public Records: Texting, Tweeting and Facebook or the Public’s*

Right to Access Versus Private Property Rights (June 26–27, 2013), [http://www.fl-counties.com/docs/default-source/faca/cle-documents/public-records-texting-tweeting-written-materials\(guthrie-stewart-osinoff\).pdf?sfvrsn=2](http://www.fl-counties.com/docs/default-source/faca/cle-documents/public-records-texting-tweeting-written-materials(guthrie-stewart-osinoff).pdf?sfvrsn=2).

109. See Mo. Rev. Stat. § 610.025 (requiring transmission of “any message relating to public business by electronic means” to a public office computer or to the state custodian of records).

110. See Joe Harris, *Ferguson Charges \$2,000 for Press FOIA Requests*, *Courthouse News Services* (Oct. 8, 2014), <http://www.courthouse-news.com/ferguson-charges-2000-for-press-foia-requests/>; <http://www.mintpressnews.com/ferguson-officials-demand-exorbitant-fees-michael-brown-files/197074/>.

111. See Attorney General of Missouri, *Sunshine Request – A Copy of the Sunshine Law Complaint Made by Chris McDaniel in 2014 Regarding the City of Ferguson and Responses by the Attorney General’s Office, on File with Author*.

112. Ky. Rev. Stat. § 61.870(2).

113. Ky. Op. Att’y Gen. 15-ORD-226, 2015 WL 9647502, at *2 (Dec. 30, 2015). See also Ky. Rev. Stat. § 61.878(1) (exempting from the law “preliminary” notes, memoranda, and recommendations. Applying this exemption, the Court of Appeals of Kentucky in 2006 concluded that certain emails regarding city ordinances authored by officials of Bowling Green fell under this exception. *Baker v. Jones*, 199 S.W.3d 749, 752 (Ky. Ct. App. 2006).

114. See Adam Lashinsky, *Microsoft Takes On ‘Silicon Valley Darling’ Slack*, *Fortune* (Sep. 23, 2015), <http://fortune.com/2015/09/23/microsoft-slack-killer/>.

115. See Kaveh Waddell, *Are Slack Messages Subject to FOIA Requests?*, *The Atlantic* (Jan. 27, 2016), <https://www.theatlantic.com/technology/archive/2016/01/are-slack-messages-subject-to-foia-requests/429243/>.

116. See List of All Slack Teams Used by FCC Employees, *MuckRock*, <https://www.muckrock.com/foi/unit-ed-states-of-america-10/list-of-all-slack-teams-used-by-fcc-employees-23398/> (last visited Mar. 6, 2017).

117. *Secret Messaging App Used by San Francisco Officials*, CBS SF Bay Area (Mar. 17, 2016), <http://sanfrancisco.cbslocal.com/2016/03/17/report-san-francisco-officials-using-secret-messaging-app/>; Tim Cushing, *San Francisco Legislators Dodging Public Records Requests with Self-Destructing text Messages*, Techdirt (Mar. 17, 2016), <https://www.techdirt.com/articles/20160317/07505233930/san-francisco-legislators-dodging-public-records-requests-with-self-destructing-text-messages.shtml>. According to these articles, the Telegram app has gained particular notoriety because the terrorist group ISIS has encouraged its use among militants and their followers.

Id.

118. See Ashley Parker & Philip Rucker, *Upheaval Is Now Standard Operating Procedure Inside the White House*, Washington Post (Feb. 13, 2017), https://www.washingtonpost.com/politics/upheaval-is-now-standard-operating-procedure-inside-the-white-house/2017/02/13/d65dee58-f213-11e6-a9b0-ecee7ce475fc_story.html?utm_term=.cb9722c9331f; Jonathan Swan & David McCabe, *Confide: The App for Paranoid Republicans*, Axios (Feb. 8, 2017), <https://www.axios.com/confide-the-new-app-for-paranoid-republicans-2246297664.html>.

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